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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY FLYNT; ALTHEA FLYNT; L.F.P., INC.;
LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE INC.;
FLYNT DISTRIBUTING CO.; FLYNT SUBSCRIPTION CO.;
LFZ, LTD.; ISLAND DISTRIBUTING, INC.;
DAVID KAHN; JIM GOODE, DOUG OLIVER;
N. MORGEN HAGEN; LONN M. FRIEND;
INLAND EMPIRE PERIODICALS
and PARK PLACE MARKET, INC.,
Petitioners,

vs.

GERRY L. SPENCE and THE SPENCE FOUNDATION
FOR PEOPLE'S ATTORNEYS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WYOMING STATE SUPREME COURT

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QUESTIONS PRESENTED

1. Does the First Amendment protect statements in an editorial column that do no more than (a) direct epithets at the plaintiff, (b) criticize the plaintiff's subjective motives, and (c) characterize as a "nuisance" a lawsuit in which summary judgment against plaintiff was later entered?

2. Has the Wyoming Supreme Court erred by holding that Milkovich permits an action to be based on the publication of an editorial opinion which neither makes nor implies any factual assertions?

3. Has the Wyoming Supreme Court erred by holding that Milkovich renders statements of opinion concerning public figures devoid of constitutional protection unless they are fair comment on matters of public concern?

4. Does the First Amendment require the trial court to determine whether Gerry Spence is a public figure, especially where (a) Spence admits in a binding response to a request for admission that he is a public figure, (b) overwhelming evidence of his television appearances and book publications is presented, and (c) Spence introduces no contrary evidence denying his public figure status.

5. Is a public figure lawyer subject to the same requirements as any other public figure when he files a defamation action relating to statements about his representation of a client?

6. Does the First Amendment require the granting of summary judgment in a defamation case against a public figure plaintiff who introduces no evidence of falsity of the allegedly actionable statements and no evidence of actual malice?

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LARRY FLYNT; ALTHEA FLYNT; L.F.P., INC.; LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE INC.; FLYNT DISTRIBUTING CO.; FLYNT SUBSCRIPTION CO.; LFZ, LTD.; ISLAND DISTRIBUTING, INC.; DAVID KAHN; JIM GOODE, DOUG OLIVER; N. MORGEN HAGEN; LONN M. FRIEND; INLAND EMPIRE PERIODICALS and PARK PLACE MARKET, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE WYOMING STATE SUPREME COURT.

INTRODUCTION

Petitioners hereby petition this Court for a writ of certiorari to the Wyoming State Supreme Court in the case of Spence v. Flynt, Wyoming State Supreme Court Number 89-17 (lower court number 6568).

THE PARTIES

Petitioners (defendants below) are Larry Flynt; the Estate of Althea Flynt; L.F.P., Inc.; Larry Flynt Publications; Hustler Magazine, Inc.; Flynt Distributing Co.; Flynt Subscription Co.; LFZ, Ltd.; Island Distributing, Inc.; David Kahn; Jim Goode, Doug Oliver; N. Morgen Hagen; Lonn M. Friend; Inland Empire Periodicals and Park Place Market, Inc.[1/] Respondents (plaintiffs below) are Gerry Spence and the Spence Foundation for People's Attorneys, Inc.

OPINIONS BELOW

The opinion of the Wyoming State Supreme Court is reported at 816 P.2d 771, 19 Media L. Rptr. 1129, and 1991 Wyo LEXIS 125; a copy is appended as Appendix A. The order denying rehearing is reported only at 1991 Wyo. LEXIS 147; a copy is appended as Appendix B. The unreported opinion of the District Court of Teton County, Wyoming, which granted summary judgment in favor of petitioners, is appended as Appendix C.

[1/] Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Petitioners note that they have no parent corporations or subsidiaries, other than wholly-owned subsidiaries.

JURISDICTIONAL STATEMENT

The opinion of the Wyoming State Supreme Court was dated August 8, 1991. Petitioners timely filed a petition for rehearing on August 23, 1991. The petition was denied on September 16, 1991. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This lawsuit is one of five suits filed by nationally known attorney Gerry Spence against Larry Flynt, Hustler Magazine, and others, pertaining to monthly editorial columns in Hustler Magazine entitled "Asshole of the Month."[2/] All five cases were

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[2/] In addition to this lawsuit, the other four lawsuits are: Dworkin v. Hustler Magazine, Inc., 668 F.Supp. 1408 (C.D. Cal. 1987), aff'd. 867 F.2d 1188 (9th Cir. 1989), cert. denied, 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed.2d 26 (1989) ("Dworkin I"); Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988), cert. denied, 489 U.S. 1080, 109 S.Ct. 1532, 103 L.Ed.2d 837

(continued...)

decided in favor of defendants upon motions for summary judgment or motions to dismiss.

In Dworkin I, Ault, and Leidholt, the United States Court of Appeals for the Ninth Circuit affirmed the lower court judgments, and petitions for writ of certiorari were denied by this Court.[3/] Review of the decision in Dworkin II is still pending before the Wyoming Supreme Court. However, in the present case, the Wyoming Supreme Court reversed the grant of summary judgment, misinterpreting this Court's decision in Milkovich and disregarding Spence's admission that he is a public figure.

The complaint in the present case was filed in the District Court of Teton County, Wyoming, Ninth Judicial District on May 12, 1986. (C.R. 1.) On September 27, 1988, petitioners filed a motion for judgment on the pleadings or, in the alternative, summary judgment. (C.R. 1094 and 1163.) Petitioners argued that the claims for libel, intentional infliction of emotional distress, outrage and invasion of privacy were barred because (1) the article in issue constituted protected opinion, not statements of fact; (2) plaintiffs were unable to make any showing of falsity; and (3) plaintiffs were unable to make any showing of "actual malice." The lower court granted the motion, finding the statements at issue to be epithets and opinion, and not finding statements of fact. (C.R. 1313.)

[2/](...continued)
(1989) ("Ault"); Leidholt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988), cert. denied, 489 U.S. 1080, 109 S.Ct. 1532, 103 L.Ed.2d 837 (1989) ("Leidholt"); and Dworkin v. L.F.P., Inc., Wyoming State Supreme Court Nos. 89-15 (lower court No. 6328) ("Dworkin II").

[3/] Id.

Respondents appealed to the Wyoming Supreme Court, on January 6, 1989. Oral argument was conducted on September 14, 1989, before this Court issued its ruling in Milkovich v. Lorain Journal Co., ___ U.S. ___, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). On August 8, 1991, after Milkovich, the Wyoming Supreme Court issued its ruling reversing the grant of summary judgment.

On August 23, 1991, petitioners petitioned for reconsideration of the Wyoming Supreme Court's ruling. That petition was denied on September 16, 1991. Accordingly, the present petition is filed.

The Wyoming Supreme Court has erred in three enormously consequential ways: First, the Wyoming Court erroneously construed and applied the Milkovich decision. Milkovich held that the publication of an opinion may be actionable where it contains or implies false assertions of fact. In contrast, the Wyoming court construed Milkovich as holding that the publication of any opinion may be actionable, regardless of whether it contains or implies an assertion of fact. In so holding, the Wyoming court has applied Milkovich to eliminate the constitutional requirements that public figure defamation plaintiffs must show: (1) an assertion of fact; (2) falsity; and (3) actual malice, i.e. knowledge or reckless disregard of falsity. This ruling undermines First Amendment protections established by this Court and is inconsistent with the decisions of this and other courts. It makes every epithet and every joke at the expense of another person actionable. Once the requirement of an assertion of fact (whether express or implied) is abandoned, then the Constitutional requirement of falsity[4/] must also be abandoned, as

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[4/] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

well as the Constitutional requirement of "actual malice", in public figure/public official cases.[5/]

Second, the Wyoming Court's decision casts aside the protections of New York Times v. Sullivan and replaces it with the common law protection of fair comment on matters of public concern. This doctrine provides protection only for opinions "not made solely for the purpose of causing harm." 816 P.2d at 775 (quoting Milkovich out of context). This departure from previously established case law is also based on a misconstruction of Milkovich. The Wyoming decision undermines First Amendment protections established by the Court by imposing a "good faith" requirement on a critical speaker.

Third, the Wyoming Court's decision flouts principles developed by this Court for determination of public figure status. Here, Spence admitted that he is a public figure.[6/] The Wyoming Court chose to ignore this express admission, as well as the overwhelming evidence of numerous television appearances by Spence (816 P.2d at 794-795) and Spence's publication of books and articles (816 P.2d at 790). Spence's public figure status was

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[5/] New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny. Indeed, one concurring Justice of the Wyoming Supreme Court expressly stated that, because no assertions of fact were at issue, there was no need for plaintiff to prove actual malice; a showing of ordinary malice should be sufficient. Concurring opinion of Thomas, J., 816 P.2d at 781.

[6/] Exhibit 1 to Defendants' Motion for Judgment on the Pleadings or In the Alternative for Summary Judgment, C.R. 1094. Under Rule 36 of the Wyoming Rules of Civil Procedure, patterned after and virtually identical to Rule 36 of the Federal Rules of Civil Procedure, an admitted fact is conclusively established for purposes of the action.

so clearly established, that he did not oppose the trial court's finding that he was a public figure, did not raise the issue on appeal, and expressly conceded (through counsel) that he was a public figure in oral argument to the Wyoming Supreme Court.[7/] Spence did not introduce any evidence contradicting his public figure status. Nonetheless, the Wyoming Court ruled that Spence's public figure status was a question of fact which must be submitted to a jury. By disregarding Spence's admission and the uncontroverted evidence of public figure status and by permitting a Wyoming jury to find that Spence is a private figure, the Wyoming decision conflicts with decisions of this Court and other courts.

Review of the present case by this Court is of the utmost importance. If this decision is allowed to stand, it will have a dramatic affect on First Amendment freedoms in Wyoming and throughout the country. The decision renders actionable any insult or joke at the expense of an individual. Indeed, all criticism is made potentially actionable by virtue of the Wyoming Supreme Court's decision. As a result, all national media, distributed or broadcast in Wyoming, will be chilled in their criticism, humor or epithetic speech, because of the Wyoming decision. Indeed, all expression of criticism, humor or epithets throughout the country will be chilled by the very real concern that the Wyoming decision might be applied.

Further, the decision undermines, in Wyoming and anywhere else applied, the established principle that the court should determine the issue of public figure status. If an uncontradicted admission of public figure status is insufficient to establish the point, then no amount of evidence will be sufficient. If the Wyoming Court's decision is not promptly reversed, there

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7/ 816 P.2d at 791.

will be no available method for prompt adjudication of defamation cases in Wyoming and no protection for criticism, humor and debate, as previously protected by this Court.

REASONS FOR GRANTING THE WRIT

1. Introduction

1.1. Background

This case arises out of a column in the July 1985 issue of Hustler Magazine (the "Article"). The article criticizes attorney Gerry Spence for his prosecution of Dworkin I against Hustler Magazine.

Gerry Spence is one of the most prominent attorneys in the United States. He has handled highly publicized lawsuits for Karen Silkwood (Silkwood v. Kerr-McGee, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984)) and for "Miss Wyoming" Kim Pring (Pring v. Penthouse Magazine, 695 F.2d 438 (10th Cir. 1982) cert. den. 462 U.S. 1132, 103 S.Ct. 3112, 77 L.Ed.2d 1367 (1983)). He has appeared on "Sixty Minutes", "Good Morning America", "The Today Show", "Nightline", and numerous other television shows, both nationally and on local stations across the country. 816 P.2d at 794-795. He is the author of several books including Gunning for Justice, which was published in 1982, well before the article in this case. 816 P.2d at 790.

In the Pring lawsuit, Spence represented the plaintiffs in a defamation action against Penthouse, a well-known "adult" magazine. Pring v. Penthouse International, Ltd., 695 F.2d at 439. In 1986, Spence published a book about the Pring case -- Trial by Fire. 816 P.2d at 776. In Dworkin I Spence again represented the plaintiffs in a defamation action against an adult magazine. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188,

1191 (9th Cir. 1989). The Ninth Circuit described the parties to Dworkin I as follows:

> "Andrea Dworkin is a prominent and outspoken feminist author and activist. She is a vocal advocate for the prohibition of pornography, and was one of the principal drafters of the ordinance against pornography enacted by the City of Indianapolis and struck down as unconstitutional. [Citation.] By her own admission, she is a public figure in this case. Hustler Magazine is a pornographic periodical.
>
> ". . .
>
> "Dworkin originally filed her complaint in Wyoming state court. With her as plaintiffs were Judith Fouts and Priscilla Moree, in their individual capacities and, respectively, as representatives of the Wyoming and the Jackson, Wyoming Chapters of the National Organization for Women ('NOW')." 867 F.2d at 1190-1191.

Dworkin I was a lawsuit by an outspoken opponent of pornography, together with representatives of the National Organization for Women, against a pornographer. By its very nature, this lawsuit became a matter of public interest, and spawned the article at issue in this case.

1.2 The Article

The July 1985 issue of Hustler Magazine contained a regular monthly feature entitled "Asshole of the Month." The column designated Gerry Spence as the "Asshole of the Month". A copy of the article is appended hereto as Appendix D.

The Article contains three statements of which Spence complains:

(1) That Spence is an "asshole" (expressed colorfully as "vermin-infested turd dispenser", "shameless shithole", etc.);

(2) That in filing an action for Dworkin against Hustler Magazine, Spence was motivated by greed rather than his purported family values; and

(3) That the lawsuit filed on behalf of Dworkin against Hustler Magazine was a "nuisance" suit.

First, as set forth below, the characterization of Spence as an "asshole" is a mere epithet, carrying no factual connotation; a plethora of case law makes clear that the use of epithets does not constitute actionable defamation. Second, the questioning of an individual's motives also has been widely held not to constitute actionable defamation, since the motive is subjective, not objectively verifiable. Here, this is particularly true, since the criticism of Spence's motives is based on disclosed facts about which Spence does not complain. (In fact, Dworkin's views are greatly at odds with Spence's "family" values. As the trial court ruled: "I find that, as an undisputed fact in her article 'Woman Hating,' attached to the motions, [Dworkin] can reasonably be interpreted as being an advocate of bestiality, incest and sex with children." C.R. 1305; Appendix C.) Finally, Hustler's characterization of the Dworkin I lawsuit -- a lawsuit against Hustler -- as a "nuisance" certainly cannot be deemed actionable defamation, since that constitutes at most rhetorical hyperbole, commonly used to express the author's belief that the lawsuit is without merit. (In fact, the lack of merit of Dworkin I has been established by the granting of summary judgment for defendants, affirmed in the Ninth Circuit Court of Appeals, with a petition for certiorari denied by this Court.)

1.3. The Wyoming Supreme Court Decision.

The Wyoming Court's analysis is premised on its belief that "the law of defamation has moved along a strange path." 816 P.2d at 774. The Wyoming Court noted this Court's decision in Falwell as holding that a statement which was not believable, constituting "imaginative expression" or "rhetorical hyperbole," was not actionable. Id. However, the Wyoming Court attempted to distinguish Falwell on the ground that "arguably" Spence was not a public figure. Id. The purported distinction is unavailing. As discussed in Section 4 below, Spence has admitted that he is a public figure -- an admission supported by strong evidence and not contradicted.

The Wyoming Court cited Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), as holding that insults and profane speech, among other things, are not safeguarded by the Constitution. This, the Wyoming Court holds, "intimates that an individual is entitled to maintain an action for redress of the kind of grossly defamatory statements as those at issue here." The fighting words rationale of Chaplinsky, a criminal prosecution, has never permitted recovery for speech in written form, let alone a publication remote in time and place from the plaintiff. In Section 2.3, we demonstrate that insults which carry no factual content are not actionable, notwithstanding Chaplinsky.

The Wyoming Court then cites Milkovich for the propositions that there is no "opinion defense" (816 P.2d at 775), and that all statements are actionable if they hold plaintiff up to "hatred, contempt or ridicule." Id. The court quotes Milkovich out of context to say that "an expression of opinion could be defamatory . . . even though the truth or falsity of an opinion -- as distinguished from a statement of fact -- is not a matter that can be objectively determined and truth is a complete defense to a suit

for defamation." Id. Yet the decisions of this Court, from New York Times v. Sullivan through Milkovich (Section 2.1), and the decisions of numerous state courts (Section 2.2) make clear that a statement cannot be actionable unless it expresses or implies a false statement of fact. Statements of opinion are not actionable unless they express or imply false statements of fact. But it is the falsity of the factual assertion which is essential to a claim of defamation.

According to the court, the only protection for defamatory expressions of opinion is the doctrine of "fair comment." 816 P.2d at 775-776. Thus, opinion is protected only where it is "the honest expression of opinion on matters of legitimate public interest . . . and was not made solely for the purpose of causing harm." As we discuss in Section 3, this attempt to create a good faith requirement for statements of opinion is precluded by Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

The consequence of the Wyoming Court's pronouncements is to effect a radical change in First Amendment law. Insults, jokes and criticism become defamatory, since they may hold one up to hatred, contempt or ridicule; epithets and "profane" speech are no longer entitled to any Constitutional protection; there is no longer any requirement of falsity, since an opinion may be defamatory even if it does not express or imply any false assertion of fact. As a result, the Wyoming decision places insults, jokes and criticism at risk, protected only by the "fair comment" doctrine -- a doctrine of common law, not Constitutional law.

The Wyoming Supreme Court also attempted to destroy public figure doctrine. It acknowledged that "it is admitted by all that Spence is a public figure"; however, the court gratuitously added -- "at least for some purposes" -- without any factual support for this limitation. There is not a shred of evidence in the

record limiting Spence's public figure status to only "some purposes." Spence is one of the best-known trial lawyers and legal spokesmen in America. The record discloses numerous appearances by him on television and that he is a published author. As discussed in Section 4, Spence's uncontradicted admission that he is a public figure is conclusive, and his failure to introduce any evidence of falsity or actual malice is dispositive on summary judgment.

2. The Ruling That The Article Might Be Actionable Even Without A False Statement Of Fact Conflicts With Decisions Of This And Other Courts.

The Wyoming Court seriously erred when it confused the opinion defense with the requirement of an assertion of fact. The Milkovich decision unquestionably retained the requirement that only an assertion of fact can be defamatory; it simply made clear that a statement in the form of an opinion is not automatically privileged, and therefore, if that opinion contained or implied to a reasonable reader a false assertion of facts, it might still be actionable. The Milkovich Court did not abandon the requirement that an actionable defamation must contain or imply a false statement of fact.

2.1 The Milkovich Decision And Other Decisions Of This Court

In Milkovich, the Court noted the well known statement in Gertz v. Robert Welch, Inc., 418 U.S. 223, 94 S.Ct. 2997, 41 L.Ed, 2d 789 (1974), that "there is no such thing as a false idea." However, the Milkovich Court made clear that this did not give rise to an opinion defense:

> "We do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'... Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." 110 S.Ct. at 2705.

Again, the Court made clear that "the statement [of opinion] may still imply a false assertion of fact. Simply couching such statement in terms of opinion does not dispel these implications..." 110 S.Ct. at 2706.

On the other hand, the requirement that a defamatory statement contain a false statement of fact was reaffirmed by the Milkovich Court's discussion of Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 256 L.Ed.2d 6 (1970) (characterization of developer's negotiating position as "blackmail" was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable"); Letter Carriers v. Austin, 418 U.S. 264, 284-286, 94 S.Ct. 2770, 2781-2782, 41 L.Ed. 2d 745 (1974) (use of the word "traitor" to describe a union "scab" was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members", and therefore was not actionable); and Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L. 82d 41 (1988)(accusation that plaintiff Falwell engaged in a drunken, incestuous rendezvous with his mother in an outhouse could not reasonably be understood as describing actual facts, and therefore was not actionable.)

The Milkovich Court clearly approved this line of Supreme Court authority:

> "[T]he Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." 110 S.Ct. at 2706.

This Court certainly has not abandoned the requirement that actionable defamation state or imply a false assertion of fact. Opinion which cannot reasonably be interpreted as stating actual facts about an individual is not actionable.

2.2 The Wyoming Ruling Conflicts With Other State Court Decisions.

The highest Courts of the States of New York, Arkansas, and Maine, as well as numerous other lower courts, have repeated Milkovich's requirement of a false statement of fact (whether express or implied) as a prerequisite to a defamation action. In Immuno A.G. v. Moor-Jankowski, 18 Med.L.Rptr. 1625 (1991), the Court analyzed Milkovich and noted that:

> "The key inquiry is whether challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."

The Immuno Court then examined the factual statements that could reasonably be implied by the statements at issue, and found that the plaintiff had not raised a triable issue as to the falsity of any of the threshold factual assertions.

In Dodson v. Dicker, 306 Ark. 108, 812 S.W. 2d 97 (1991), the Court ruled, on the basis of Milkovich, that:

"the threshold question in defamation actions is not whether a statement could be considered an 'opinion' but rather whether a reasonable fact-finder could conclude that the statement implies an assertion of an objective, verifiable fact." (Citations omitted.)

In Dodson, the Court confronted a letter by the Appellant accusing an official of rewriting a licensing test for profit and referring to the Appellee as a "sneaky bully." However, the Arkansas Court concluded that "The fact that she referred to David Dicker with intemperate language does not convince us that the statements, in their totality, were the type of assertions of objective facts about Mr. Dicker that give rise to liability in a defamation action. Dodson's statements do not meet the threshold requirement for a defamation action.

In accord is the decision of the Supreme Court of the State of Maine. Luster v. Powers, 1991 Me. Lexis 195 (charge that Professor was homophobic, offensive, insensitive, and occasionally intimidating are personal observations, not statements of fact; citing Milkovich for the proposition that "under First Amendment, statements are protected as opinion unless 'provably false', and capable of being reasonably interpreted as making or implying false and defamatory statements concerning actual facts." P.9, n.9).

Accord, Haueter v. Cowles Publishing Co., 61 Wash. App. 72, 811 P.2d 231 (Wash.App. 1991) ("Milkovich . . . held 'a statement on matters of public concern must be provable as false before there can be liability under state defamation law . . .'.[¶] Mr. Hickey's statements, to the effect that Mr. Haueter's organizations were phony fronts, are not provable as false. Rather they represent the 'rhetorical hyperbole' necessary to free public debate.") Lund v. Chicago and Northwestern

Transportation Co., 467 N.W.2d 366 (Minn. App. 1991) ("[phrase] . . . 'shit heads' does not suggest verifiably false facts about Lund. Moreover, the terms 'favoritism' and 'brown nose' are vague, and the ambiguous implications of the words prevent them from being proven true or false.")

See also Flip Side, Inc. v. Chicago Tribune Co., 18 Med.L.Rptr. 1409 (Ill. App. 1990):

> " . . . [to be defamatory,] the communication . . . must be reasonably understood to be a false communication of fact about the plaintiff. . . . Only statements that are capable of being proved false are subject to liability under the law of liable."

18 Med.L.Rptr. at 1415 (Citing Milkovich, Brennan, J. dissenting). The Court ruled that defendant's comic strip did not reasonably imply any statements of fact concerning plaintiff and therefore was Constitutionally protected.

Finally, in Ward v. News Group Newspapers, Inc., 13 Med.L.Rptr. 1140 (U.S.D.C., C.D.Cal. 1990), a federal district court granted reconsideration of its decision after Milkovich, and then reaffirmed its decision that comments that plaintiff's private life was "sordid and gross" and "sure to shock millions" are not factually provable, and therefore are not actionable. "They both fall into the category of 'loose, figurative or hyperbolic' language which makes readers realize that the statements are not true 'facts'". 13 Med.L.Rptr. at 1142.

2.3 The Article Does Not Express Or Imply Any False Statements Of Fact.

The Wyoming Court contradicts the Constitutional requirement imposed by this and other Courts that actionable

defamation be based on express or implied assertions of fact. The majority does not even discuss what factual assertions are expressed or implied by the article in question. As noted above, there are three essential assertions which Spence claims to be defamatory:

1. The colorful descriptions of Spence as an "asshole";

2. The characterization of Spence's motive in representing Andrea Dworkin as based upon greed or as constituting a sellout of personal values for money; and

3. The characterization of Dworkin I as a "nuisance" suit.

First, the use of insults has been held not actionable by a plethora of case law. Of particular note is McGuire v. Jankiewicz, 8 Ill.App. 3d 319, 290 N.E. 2d 675 (1972) in which the Court held it was not actionable defamation to call someone an "asshole". The Court described the words used as "objectionable but unactionable" name calling. The insult in McGuire is precisely the insult used in the present case.

Further, as noted above, "shit head" was held not to suggest verifiably false facts and therefore was not actionable in Lund v. Chicago and Northwestern Transportation Co., 467 N.W.2d 366 (Minn.App. 1991) and Francis v. Emery Construction Management Co., Civ. No. 1974-382 (D.V.I. 1974).

Accord, Bartow v. Smith, 149 Ohio St. 301, 305, 78 N.E.2d 735, 15 A.L.R.2d 04 (1948): "It is axiomatic that opprobrious epithets, even if malicious, profane and in public, are ordinarily not objectionable." Held: "son of a bitch" and "dirty crook" were not defamatory.

Accord, Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979): "the mere use of foul, abusive or vituperative language, such as that used by the defendant, does not constitute a defamation." (Citation omitted.)

Accord, Wainman v. Bowler, 176 Mont. 91, 576 P.2d 268 (1978); Curtis Publishing Co. v. Birdsong, 360 F.2d 344, 348 (5th Cir. 1966).

The Wyoming Court mistakenly relied upon Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), in concluding that epithets are not constitutionally protected. In Chaplinsky, "[t]he statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . ." 62 S.Ct. at 770. Certainly, there was no face-to-face contact here and no imminent breach of the peace; Chaplinsky does not apply.[8/] Moreover, numerous cases in the last twenty years -- such as Bresler and Falwell -- have firmly established that constitutional protection applies to imaginative expression and rhetorical hyperbole of the type employed in this case. The Wyoming Court may not ban insults or sanitize public debate under the guise of Chaplinsky.

Second, the Article contains several statements criticizing Spence's motives in filing the Dworkin lawsuit, e.g.: "Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry 'This Tongue For Hire' Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes." The Article proceeds to state "You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin."

The cases are legion in asserting that statements as to the motives of individuals are not objectively verifiable, and are not statements of fact which support defamation claims. In Janklow

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[8/] The Chaplinsky decision has received extremely limited application. Thus, in Collins v. Smith, 578 F.2d 1197 (7th Cir. 1978), the court ruled that a group of Nazis would be allowed to march through a Jewish community in Skokie, Illinois, notwithstanding the "fighting words" doctrine.

v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. en banc 1986), South Dakota's Governor Janklow filed a defamation action alleging that an article attributed to him an improper motive in prosecuting American Indian activist Dennis Banks when Janklow was the state attorney general. Janklow alleged that the article implied that he was motivated by personal revenge in his prosecution of Banks, and was therefore defamatory. The Court ruled that plaintiff's motive was subjective, not objectively verifiable, and specifically stated, "the singling out of an impermissible motive is a subtle and slippery enterprise, particularly when the activities of public officials are involved." 788 F.2d at 1304 (citation omitted.)

The Seventh Circuit has also concluded that a statement about a plaintiff's intentions is not objectively verifiable. In Woods v. Evansville Press, 791 F.2d 480 (7th Cir. 1986), the plaintiff sued for libel, claiming a newspaper impugned his motives for running religious programming by suggesting that the motives were for profit rather than religious belief. Again, the court held "Mr. Fitzgerald's comment is not objectively verifiable and read in context would not be understood as a statement of fact by a reasonable reader." 791 F.2d at 487 (citation omitted). Accord, Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983) (holding that a statement relating to plaintiff's state of mind was not verifiable and not a statement of fact).

In the present case, Hustler had the audacity to say that Spence's motives were not pure. But this opinion was based upon facts which were disclosed, true, and undisputed. Spence is representing a client philosophically at odds with his own views. (As noted above, the characterization of Dworkin's views as favoring "bestiality, incest and sex with children" was found to be true by the trial court on the basis of Dworkin's own writings. C.R. 1305; Appendix C. See also excerpts from Dworkin's book

Woman Hating at C.R. 1094.) He did file the Dworkin lawsuit seeking $150 million in damages. He has, in the past, taken a fifty percent contingent fee for his services. He is wealthy, and he does own a 35,000 acre ranch. This Court should make clear that there is nothing improper about questioning the motives of Gerry Spence.[9/]

Comment a to the Restatement (Second) of Torts §566 provides that an opinion may be actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Comment c makes clear that:

> "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an

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9/ The Wyoming majority opinion contains a misleading non sequitur where it states, on page 6:

> "And the claim that Spence sold out his personal values for a chance to 'fatten his wallet' with a 'possible $75 million' may be a false statement of fact, for it appears that Spence may be able to prove that he stands personally to gain nothing monetarily from this litigation since it appears that Spence may have assigned all of his recovery to a charitable organization to provide pro bono legal services to the poor and disadvantaged."

Spence has not assigned any portion of his fee from Dworkin I to any person or organization; rather, he has purported to assign the recovery he may personally receive in the present litigation. Spence has never denied that he would have made money from the Dworkin I lawsuit if he had won it. Spence's purported assignment of monies in this case occurred only after the article was printed. Of course, the article's characterization of Spence's motive in filing Dworkin I as greed is not undermined by a later charitable gesture by Spence.

> action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is."

(Emphasis added.) Given the disclosed facts and the tenor of the Article, no reasonable reader could infer false assertions of fact from the criticism of Spence. Spence does not complain about the disclosed facts or about any allegedly implied factual assertions; he complains only about Hustler's opinion (questioning his motives) based on undisputed facts, and about the use of epithets. Anyone has the right to question the motives of another, as long as no false factual information is stated or implied. The First Amendment requires no less.[10/]

Finally, Hustler's characterization of Dworkin I as a "nuisance" suit certainly does not imply any false assertion of fact. This is no more than rhetorical hyperbole by a defendant, stating that the suit against it has no merit. Indeed, the district court in Dworkin I granted a motion for summary judgment (668 F.Supp. 1408), and the judgment was affirmed on appeal (867 F.2d 1188). Certainly, if the characterization of a real estate developer's bargaining position as "blackmail" is protected rhetorical hyperbole (Greenbelt v. Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 90 S.Ct. 1537 (1970), then the present characterization of a meritless lawsuit as a "nuisance" must also be protected.

10/ The defamatory statement in Milkovich was not the simple use of epithets or the questioning of a man's motives. In Milkovich, a newspaper report did not simply accuse the plaintiff of greed or call him names. Rather, it said: "Anyone who attended the [wrestling] meet . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." 110 S.Ct. at 2698. This is not a criticism of a man's motive; it is an accusation of perjury, far removed from the statements at issue in this case.

3. The Wyoming Court's Ruling That Fair Comment Is The Only Constitutional Protection For Defamatory Opinion Conflicts With Decisions Of This Court.

The Wyoming Court apparently seeks to rewrite First Amendment law by finding defamatory opinion (that is, opinion which subjects one to hatred, contempt or ridicule) to be protected only when made as "the honest expression of opinion on matters of legitimate public interest . . . not made solely for the purpose of causing harm." 816 P.2d at 775 (citing Milkovich). The Wyoming Court makes clear the necessity of good motives in criticizing public figures:

> "A public figure is not subject to defamatory attack and criticism just because he is a public figure. In other words, Larry Flynt is not free to arise each morning and select a public figure to attack and defame for no reason at all. . . . Thus, if Spence engaged in this controversy beyond the confines of the litigation, [that is, if he is a public figure], he may be subject to appropriate defamatory criticism - fair comment upon a matter of public concern."

816 P.2d at 776 (emphasis added).

In a concurring opinion, Justice Thomas, who acknowledged that Spence was a public figure, succinctly asked whether the First Amendment gave a speaker the right to insult another (even a public figure), and answered, "no." Id. at 779-780.

Yet for twenty-five years, this Court has held that liability for defamation cannot be imposed simply because a statement, whether true or false, was made out of hatred. Garrison v. Louisiana, 379 U.S. 64, 72-74, 85 S.Ct. 209, 215, 13 L.Ed.2d

125 (1964); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 10-11, 90 S.Ct. 1537, 1540 (1970).

> "[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . .' And Constitutional prohibition in this respect is no different whether the plaintiff be considered a 'public official' or a 'public figure'." Greenbelt, 398 U.S. at 10-11 (citations omitted).

The Wyoming Court's reliance on Milkovich is disingenuous. The Wyoming Court quotes from Milkovich's discussion of the development of defamation law. It quotes a portion of that discussion that precedes the discussion of New York Times v. Sullivan, and the application of the First Amendment to state defamation law. Milkovich does not give any indication of an intent to eliminate a quarter century of First Amendment law following New York Times v. Sullivan; to the contrary, it reaffirms important Supreme Court precedents.

The Wyoming Court's decision creates a dangerous precedent; criticism, humor and insults are made actionable, and are protected only if made with good motives. This is an ominous and unfounded rule, misinterpreting Milkovich and contradicting Greenbelt and Garrison. It is imperative that the Court step in and void this precedent.

4. The Wyoming Court's Ruling -- That A Jury Must Decide Whether Spence Is A Public Figure -- Conflicts With Decisions Of This And Other Courts.

4.1 The Determination Of Public Figure Status Is A Matter Of Law.

In Rosenblatt v. Baer, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966), this Court observed that "as in the case with questions of privilege it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official'." The Rosenblatt Court explained:

> "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." Id. n. 15 (citations omitted).

Rosenblatt's characterization of the public official question as one for the court has been extended to public figures and indeed has become a commonplace feature of libel law. See Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1975). "This determination [of public figure status] is ultimately one of law." Reuber v. Food Chemical News, Inc., 925 F.2d 703, 708 (4th Cir. 1991).

4.2 Spence Admitted He Is A Public Figure.

The Wyoming Supreme Court had before it all that was necessary to determine that Spence was a public figure. In

response to a request for admission, Spence expressly said: "Gerry Spence admits that he is a 'public figure'."[11/] Spence never attempted to controvert this admitted fact.[12/]

Apart from Spence's uncontroverted admission, the evidence is abundant and undisputed that he is a public figure. The record contains a lengthy list setting forth numerous television appearances both on national media and on local stations across the country (816 P.2d at 794-795). In Masson v. New Yorker Magazine, Inc., 111 S.Ct. 2419, 2428 (1991), this Court accepted the plaintiff's concession that he was a public figure and, without further analysis, then considered the issue of whether or not actual malice was present. Similarly, in other cases, the Courts have accepted without further inquiry a party's stipulation that the plaintiff was a public figure. See Maheu v. Hughes Tool Company, 569 F.2d 459 (9th Cir. 1977).

The Wyoming Court's ruling that the public figure question should be submitted to a jury specifically contradicts the rulings of the Ninth Circuit in two other cases filed by Spence. Dworkin v. Hustler, 867 F.2d 1188 (9th Cir. 1988) (Dworkin I);

11/ Exhibit 1 to Defendants' Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment, C.R. 1094.

12/ Rule 36 of the Wyoming Rules of Civil Procedure, like Rule 36 of the Federal Rules of Civil Procedure, permits requests for admissions and provides that any matter admitted is "conclusively established unless the court permits withdrawal or amendment of the admission." The admission requires the trial court to find the fact to have been established. T.Z. Land and Cattle Company v. Condict, 795 P.2d 1204, 1208-1209 (Wyo. 1990). Thus, even if Spence had desired to introduce controverting evidence, he would have been precluded from doing so under the Wyoming Rules of Civil Procedure (which are identical in all pertinent respects to the Federal Rules of Civil Procedure).

Leidholdt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988). Just as in Dworkin I and Leidholdt, in the instant case plaintiff admitted that he is a public figure. It was error for the Wyoming Supreme Court to hold that public figure status was a question for the jury to decide, and it was error for the Court to ignore the admitted, uncontroverted evidence which required a finding that Spence is a public figure.

The Wyoming Court seems to provide special treatment for public figure attorneys in order to encourage them to handle high-profile cases. But this case does not involve an issue of whether an attorney automatically becomes a public figure simply because he takes on a high profile case; this case involves an attorney whose public figure status was established entirely independently of his representation of Dworkin. As a public figure, Spence was fully capable of using national and local media to respond to any allegedly defamatory statements.

Moreover, if public figure attorneys are exempted from the First Amendment constraints on defamation actions in order to encourage them to handle unpopular cases, then public figure newsmen may claim a similar exemption to encourage the reporting of unpopular stories, public figure religious spokesmen may claim similar privileges, and public officials of all kinds may seek exemption. Gerry Spence must meet the actual malice test in order to prevail in a defamation action, not because of his representation of a public figure, but because he himself is a public figure.

Spence has admitted being a public figure, and his admission has been supported by overwhelming and uncontradicted evidence. The Wyoming Court's creation of a category of exempt public figures sets a dangerous precedent.

5. Spence Has Not Met His Burden Of Proving Falsity Or Actual Malice.

A public figure plaintiff has the burden of proving "actual malice" by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2514 (1986); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Since falsity is an element of constitutional actual malice, it is the plaintiff's burden to prove falsity by clear and convincing evidence. Andersen v. Liberty Lobby, 106 S.Ct. at 2508. See also, Old Dominion Branch, No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) ["before the test of reckless or knowing falsity can be met, there must be a false statement of fact."] On matters of public concern, even "a private figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. at 1564.[13/]

On summary judgment, defendants do not have to come forward with any evidence in support of the motion, since it is the

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[13/] There can be no doubt that the Article addresses matters of public concern. In Dworkin I, plaintiff argued that the features about her were not matters of public concern. The Ninth Circuit specifically noted that "the conflict about pornography is a matter of public concern and the Features are a part of that conflict." 867 F.2d at 1195. Accord, Ault, 860 F.2d at 881 ["there is a heated and spirited debate on pornography of which this article is a part, and in which epithets, fiery rhetoric and hyperbole are expected."]

Here the Article criticizes Dworkin's continued attacks on pornography and Hustler magazine, and specifically criticizes Spence's involvement in this attack --"You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin."

plaintiff who has the burden of proof at trial on this issue. Celotex Corp. v. Catratt, 477 U.S. 317, 323-326, 106 S.Ct. 2548, 2553-2554 (1986) [moving party need not introduce evidence in support of summary judgment, but may instead simply point to the absence of evidence to support other party's case, if other party has burden of proof]. It is plaintiff's burden, in opposing a motion for summary judgment, to present evidence that there is a triable issue of fact as to the existence of a false statement of fact in defendants' column. Id.; Anderson v. Liberty Lobby, 106 S.Ct. at 2514.

Accord, Clyburn v. News World Communications, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990) [limited purpose public figure could successfully resist summary judgment motion only if he could point to evidence from which it could be established by clear and convincing evidence that articles were published with actual malice]; Perk v. Reader's Digest Ass'n, Inc., 931 F.2d 408 (6th Cir. 1991) [public figure must show clear and convincing evidence of actual malice to defeat motion for summary judgment]; Dworkin I, supra at 1195 [motion for summary judgment affirmed on the ground that Dworkin had failed to show any evidence of actual malice.]

In the present case, defendants pointed to the absence of evidence of falsity in their moving papers. (C.R. 1094.) However, Spence was unable to present any evidence of falsity in opposition to defendants' motion for summary judgment, let alone clear and convincing evidence as required by Anderson and Hepps. In reversing the trial court's order granting summary judgment, the Wyoming Supreme Court departed from clear precedent expressly set forth by this Court. The State of Wyoming has no exemption from the reach of the First Amendment or the decisions of this Court. This petition for certiorari should be granted.

6. Conclusion

If this Court does not take prompt action to reverse the decision of the Wyoming Supreme Court, that decision will act as a severe limit on First Amendment freedoms in Wyoming and throughout the country -- by chilling the national media, by setting a precedent for other state courts, and by chilling speakers concerned about the impact of this precedent in their states.[14/]

The Wyoming decision sets a dangerous precedent by eliminating the requirement of a false assertion of fact as a prerequisite for a defamation action; this new rule contradicts decisions from New York Times, through Bresler and Milkovich, as well as numerous state courts. The Wyoming Court further sets a dangerous precedent by ruling that opinion is only protected if it constitutes fair comment on matters of public concern, not made solely for the purpose of causing harm; such a rule contradicts the vast body of First Amendment law from New York Times through Milkovich, and specifically contradicts Garrison and Bresler by requiring defendant's good motives as a basis for constitutional protection.

The Wyoming decision also sets a dangerous precedent by ruling that public figure status is to be determined by a jury, which may so decide even when faced with overwhelming,

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[14/] The dissent of Wyoming Justice Golden provides careful and cogent analysis of this case. In his conclusion, he quotes the poet Donne:

> "'[N]ever send to know for whom the bell tolls; it tolls for thee,' not just for Hustler. It tolls for all who are found within the border of this state. It tolls for every person who speaks or writes -- whether in a letter to the editor of the local newspaper or a conversation over the backyard fence. It tolls for any person, young or old, professional or unskilled, educated or illiterate,, who rails in polysyllabic words or, heaven forbid, the rougher four-letter variety against those who would call the tune to which the rest of us must dance."

uncontradicted evidence to the contrary, and even when faced with an admission to the contrary; this decision is contrary to Rosenblatt and several courts of appeals (including the Ninth Circuit decisions in Dworkin I and Leidholdt). The Wyoming decision further sets a dangerous precedent in creating exemptions from First Amendment law for attorneys, despite the absence of any authority supporting such an exemption. Finally, the Wyoming decision sets dangerous precedent in failing to grant summary judgment against a public figure who fails to produce evidence of actual malice or falsity, contrary to the Anderson v. Liberty Lobby and Celotex cases.

As long as no false statements of fact are expressed or implied, the First Amendment protects the right of all to criticize, ridicule or insult public figures -- from the scholarly criticism of economic views to an emotional exclamation of disgust at an umpire's call. Modern technology allows the dissemination of criticism, ridicule and insults throughout the country. It is essential that the free expression demanded by the First Amendment not be curtailed by the decisions of one errant state court.

Respectfully submitted,

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APPENDIX A

Gerry L. SPENCE and the Spence Foundation for People's Attorneys, Inc., Appellants (Plaintiffs) Cross-Appellees,

v.

Larry FLYNT; Althea Flynt; L.F.P., Inc., a California corporation; Larry Flynt Publications; Hustler Magazine, Inc., a California corporation; Flynt Distributing Company, a California corporation; Flynt Subscription Company, a Nevada corporation; LFZ, Ltd., a B.W.I. corporation; Island Distributing, Inc., a B.W.I. corporation; David Kahn; Jim Goode, Doug Oliver; N. Morgen Hagen; Lonn M. Friend; Inland Empire Periodicals, an Oregon corporation; and Park Place Market, Inc., a Wyoming corporation, Appellees (Defendants) Cross-Appellants.

Larry FLYNT; Althea Flynt; L.F.P., Inc., a California corporation; Larry Flynt Publications; Hustler Magazine, Inc., a California corporation; Flynt Distributing Company, a California corporation; Flynt Subscription Company, a Nevada corporation; LFZ, Ltd., a B.W.I. corporation; Island Distributing, Inc., a B.W.I. corporation; David Kahn; Jim Goode, Doug Oliver; N. Morgen Hagen; Lonn M. Friend; Inland Empire Periodicals, an Oregon corporation; and Park Place Market, Inc., a Wyoming corporation, Appellants (Defendants) Cross-Appellees.

v.

Gerry L. SPENCE and the Spence Foundation for People's Attorneys, Inc., Appellees (Plaintiffs) Cross-Appellants.

Nos. 89-17, 89-18.

Supreme Court of Wyoming.

Aug. 8, 1991.

Petition for Rehearing Denied
Sept. 16, 1991.

Attorney who had represented controversial figure who challenged pornography brought defamation action against publisher of magazine which printed article which attacked attorney. The District Court, Teton County, John T. Langdon, J., granted publisher's motion for summary judgment. Attorney appealed. The Supreme Court, Cardine, J., held that: (1) genuine issues of material fact existed as to whether attorney was a private person or a public person, precluding summary judgment, and (2) publisher was not entitled to disqualification of attorney's chosen counsel.

Affirmed in part and reversed and remanded in part.

Thomas, J., filed a specially concurring opinion.

Macy, J., filed an opinion concurring in part and dissenting in part.

Golden, J., filed an opinion concurring in part and dissenting in part.

1. Constitutional Law 90.1(5)

State constitutional provision governing freedom of speech and press and providing that truth is a defense to libel action does not provide avenue of relief that supersedes well-established First Amendment law in defamation case. Const. Art. 1, §§ 20, 37; U.S.C.A. Const.Amend. 1.

2. Jury 14(1)

Constitutional provision governing freedom of speech and press and providing that truth is a defense in libel action does not absolutely guarantee plaintiff trial to jury in defamation case. Const. Art. 1, § 20.

3. Libel and Slander 48(1)

A public figure is not subject to defamatory attack and criticism just because he is a public figure; rather, public figure who is subject to defamatory criticism is one who is involved in resolution of important public questions or who by reason of fame shapes events in areas of concern to society and who injects himself into vortex of controversy.

4. Judgment 181(33)

Genuine issues of material fact existed as to whether attorney who had represented controversial client who was involved in fight against pornography was a private person or whether he had also entered the fight against pornography and was thus a "public figure" for First Amendment purposes, precluding summary judgment in defamation action brought by attorney against publisher which had printed article critical of attorney. U.S.C.A. Const. Amend. 1.

5. Libel and Slander 48(1)

To be a public figure whom publishers are privileged to defame, absent malice, party must at least have been involved in public controversy before defamatory statement was published.

6. Libel and Slander 48(1)

A lawyer who is merely advocating for famous or controversial client is not a "public figure" merely because he has taken on cause as advocate.

See publication Words and Phrases for other judicial constructions and definitions.

7. Attorney and Client 22

Defendant was not entitled to disqualify defamation plaintiff's counsel as well as other members of firm in the absence of showing that attorney was likely to be necessary witness in action and since motion was for all appearances a diversionary motion. Rules of Prof.Conduct, Rules 3.7, 3.7(a), 3.7 comment.

8. Attorney and Client 22

Motions to disqualify chosen counsel are disfavored, especially when motion is based on what another party ought to do in choosing witnesses for trial.

Gerry L. Spence and Gary L. Shockey, argued, of Spence, Moriarity & Schuster, Jackson, for appellants.

Alan L. Isaacman, argued, David O. Carson, and Kirk N. Sullivan of Cooper, Epstein & Hurewitz, Beverly Hills, Cal., and Paul Godfrey and George E. Powers of Godfrey and Sundahl, Cheyenne, for appellees.

Before CARDINE, C.J., and THOMAS, URBIGKIT, MACY and GOLDEN, JJ.

CARDINE, Justice.

Gerry Spence, appellant, undertook to represent Andrea Dworkin in her litigation against *Hustler Magazine* (Hustler). Because he undertook to represent this client,

he was personally attacked by Hustler by being named "Asshole of the Month." Spence is a lawyer. Lawyers named "Asshole of the Month," such as Spence, are "vermin-infested turd dispensers," "parasitic scum-suckers," "shameless shitholes (whose main allegiance is to money) [who] are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets." Spence, a "hemorrhoidal type," was "Asshole of the Month for July" in 1985. Hustler claimed members of Spence's firm were potential witnesses and moved to disqualify them from representing him in this litigation. The district court denied Hustler's motion to disqualify Spence's counsel and then granted Hustler's motion for summary judgment against Spence upon his defamation claim for damages.

We reserve the summary judgment and affirm the order denying the motion to disqualify Spence's counsel.

Spence presents us with this statement of issues in his defamation action:

> "1. Whether this Court will give full force and effect to Wyoming's Constitutional issue provision that 'the jury [has] the right to determine the facts and the law, under the direction of the court' in a libel case.
>
> "2. Whether the publication about Spence was false and defamatory, and was published 'with good intent and [for] justifiable ends?'
>
> "3. Whether the publication was protected 'opinion' and whether that question ought to have been presented to the jury for determination."

In response, Hustler asserts:

> "1. Whether summary judgment was improper under Article I, Section 20 of the Wyoming Constitution.
>
> "a. Whether Article I, Section 20 forbids summary judgment in a libel action.
>
> "b. Whether the court's responsibility under the First Amendment to grant summary judgment on constitutional issues can be superseded by a provision of the state constitution.
>
> "2. Whether the statements about plaintiff Gerry Spence were constitutionally protected statements of opinion.
>
> "3. Whether Spence met his burden of proving the statements about him were false.
>
> "4. Whether Spence, a public figure, met his burden of coming forward with clear and convincing proof that defendants published falsehoods about him with knowledge that they were false or with a subjective awareness of probable falsity.
>
> "5. Whether Spence's admission that he suffered no reputational harm required dismissal of his libel suit."

Spence's lawsuit against Hustler seeking damages for defamation was precipitated by an article which appeared in the July 1985 issue of Hustler magazine. Shortly before the article was printed, Spence had filed a number of legal actions against Hustler on behalf of clients including Andrea Dworkin. The article or "column," however it might best be characterized, was this:

> "Many of the vermin-infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as

lawyers. These shameless shitholes (whose main allegiance is to money) are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July.

"Spence dudes himself up in western duds and calls himself a 'country lawyer,' but the log-cabin image is as phony as a cum-dripping whore's claim of virginity: This reeking rectum is worth millions and owns a 35,000 acre ranch. Spence's claim to fame is that in the name of 'the little guy' he's won some mighty big judgments * * *. He'd like to add HUSTLER to the list . . . for a whopping $150 million. His client is 'little guy' militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.

"Dworkin seems to be an odd bedfellow for 'just folks,' 'family values' Spence. After all, Dworkin is one of the most foul-mouthed, abrasive manhaters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance *co-authored* by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of country for this lawyer. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry 'This Tongue for Hire' Spence is more interested in promoting his bank

account than the traditional values he'd like us to believe he cherishes.

"This case is nuisance suit initiated by Dworkin, a cry-baby who can dish out criticism but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all . . . Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses." (emphasis in original)

[1,2] At the outset we must agree with Hustler that Article 1, § 20 of the Wyoming Constitution does not provide an avenue of relief that supersedes well-established First Amendment law in cases such as this. The United States Constitution, as interpreted by the United States Supreme Court, is the supreme law of the land. This is recognized in our own state constitution. Wyo. Const., Art. 1, § 37. We do not agree that Art. 1, § 20 absolutely guarantees a plaintiff a trial to a jury in a defamation case. *Spriggs v. Cheyenne Newspapers,* 63 Wyo. 416, 182 P.2d 801, 804-09 (1947); *see Tschirgi v. Lander Wyoming State Journal,* 706 P.2d 1116 (Wyo. 1985).

The district court relied heavily upon the case *Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 89 L.Ed.2d 41 (1988) in granting summary judgment in favor of Hustler in this case. The United States Supreme Court said in that case:

"We conclude that public figures and public officials may not recover for the tort of intentional infliction

> of emotional distress by reason of publications such as the one here at issue [which was similar in gutter language to that in this case] without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a 'blind application' of the *New York Times* standard, *see Time, Inc. v. Hill*, 385 U.S. 374, 390, 87 S.Ct. 534, 543, 17 L.Ed.2d 456 (1967), it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment.
>
> "Here it is clear that respondent Falwell is a 'public figure' for purposes of First Amendment law. *The jury found against respondent* on his libel claim when it decided that the Hustler ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.' * * * The Court of Appeals interpreted the jury's finding to be that the ad parody 'was not reasonably believable,' * * * and in accordance with our custom we accept this finding. Respondent is thus relegated to his claim for damages awarded by the jury for the intentional infliction of emotional distress by 'outrageous' conduct. But for reasons heretofore stated this claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here." *Hustler*, 485 U.S. at 57, 108 S.Ct. at 882-83 (emphasis added).

We first observe that development of the law of defamation has moved along a strange path to a place where we

now say that the more outrageous, vile, vulgar, humiliating and ridiculous the publication, the more it is protected. It may subject another to enormous ridicule and be more personal and hurtful than much recognized defamation, but if it is outrageous enough, it is "all right." Thus, it is "all right" to publish that Falwell had sex in an outhouse with his mother, but not "all right" to publish that Falwell had sex with a church member. Both publications state facts, both are defamatory, one would cause ridicule, perhaps contempt, the other hatred and contempt. It is said that one publication is believable, the other not; and so no matter what the ridicule, hurt and damage, the court held Falwell without a remedy. It is said that this is "imaginative expression" — "rhetorical hyperbole." The *Falwell* case states the law, and we accept it as such. But the *Spence* case is different. Spence is acting on behalf of another, arguably without personal involvement. As applied to Spence, there ought to be, and there is, a limit. It is fair comment on matters of public concern.

We do not perceive the holding enunciated in the *Falwell* case to be dispositive of the issue raised by Spence in his complaint, and we are convinced that, as Falwell was allowed to present his case to a jury, so is Spence entitled to have his theories of recovery presented to a jury for consideration. In the *Falwell* decision, the Supreme Court noted that the First Amendment freedoms that were discussed throughout that opinion are subject to limitations. In the case *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), the United States Supreme Court noted that:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of

> which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that *such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth* that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' " (emphasis added and footnotes omitted)

Although not directly in point, the quoted language in *Chaplinsky* intimates that an individual is entitled to maintain an action for redress of the kind of grossly defamatory statements as those at issue here. *Milkovich v. Lorain Journal Co.*, ____ U.S. ____, 100 S.Ct. 2695, 111 L.Ed.2d 1 (1990) furthers development of that stated in *Chaplinsky,* tracing the law of defamation in a concise, easily read and understood fashion. It is the most important decision in this area of law since *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964) and *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). First, the Court directly confronted the question whether there is "a constitutionally-required 'opinion' exception to the application of defamation laws." It laid to rest the absurd notion that anything published that is couched in

opinion language cannot be defamation for which damages are recoverable when it said:

> "[W]e think ' "breathing space" ' which ' "freedoms of expression require in order to survive," ' [*Philadelphia Newspapers, Inc. v.] Hepps,* 475 U.S. [767], at 772, 106 S.Ct. [1558], at 1561 [89 L.Ed.2d 783 (1986)] (quoting *New York Times*, 376 U.S., at 272, 84 S.Ct., at 721), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion and fact." *Milkovich,* ____ U.S. at ____ 110 S.Ct. at 2706.

Supporting this conclusion, the Court cites Restatement, Second, Torts § 566, comment (a) (1977):

> Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. * * * The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. * * * This position was maintained even though the truth or falsity of an opinion — as distinguished from a statement of fact — is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

To lessen the burden of defamatory expression of opinion,

> " '[t]he principal of "fair comment" afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact.' 1 F. Harper & F. James, *Law of Torts* § 5.28, p. 456

> (1956) (footnotes omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm." *Milkovich,* ____ U.S. at ____, 110 S.Ct. at 2703.

Was Hustler exercising a privilege of "fair comment" for an honest expression of opinion, on a matter of public concern, when Hustler stated that Spence was a vermin-infested turd dispenser," a "parasitic scum-sucker," a "shameless shithole," a "reeking rectum," a "hemorrhoidal type" and "Asshole of the Month of July?" Was that publication made solely for the purpose of causing harm? It is at least questionable whether that was fair comment on a matter of public concern not made solely for the purpose of causing harm. And the claim that Spence sold out his personal values for a chance to "fatten his wallet" with a "possible $75 million" may be a false statement of fact, for it appears that Spence may be able to prove that he stands personally to gain nothing monetarily from this litigation since it appears that Spence may have assigned all of his recovery to a charitable organization to provide pro bono legal services to the poor and disadvantaged.

The statements by Hustler about Spence are clearly defamatory, for they are such as would hold him up to *hatred, contempt or ridicule.* Unless they are protected defamatory criticism of a public figure, they are actionable, and Spence should be allowed to pursue his claim.

[3, 4] A public figure is not subject to defamatory attack and criticism just because he is a public figure. In other words, Larry Flynt is not free to arise each morning and select a public figure to attach and defame for no

reason at all. The public figure subject to defamatory criticism is one who is involved in the resolution of important public questions or who by reason of fame shapes events in areas of concern to society, *Curtis Publishing v. Butts,* 388 U.S. 130, 164, 87 S.Ct. 1975, 1996 (Warren, C.J., concurring), and who injects himself into the vortex of a controversy. The controversy here involved is Dworkin's fight against pornography. Hustler's argument is structured upon the proposition that Spence has taken up the fight against pornography, thrust himself into the controversy as a public figure, and is therefore subject to response by persons taking the other side. Spence may or may not, in fact, be personally opposed to pornography. That fact is not disclosed by the record in this case. What is disclosed by the record is that, under the circumstances presented here, he appears only to be representing a client who is fighting pornography and is on her side only in the sense that he is providing professional services to her. Thus, if Spence engaged in this controversy beyond the confines of the litigation, he may be subject to appropriate defamatory criticism — fair comment upon a matter of public concern. If, however, he did no more than represent his client in her litigation against Hustler, there is no constitutional opinion privilege for these defamatory publications. At least that is a subject of dispute between the parties and cannot be decided at the summary judgment stage of the proceedings.

[5] It seems reasonable also that Spence might be a public figure in some situations and a private person in others. While it is admitted by all that Spence is a public figure, at least for some purposes, it may develop in trial that Spence was not a "public figure" for his role as a lawyer representing Dworkin which led to the allegedly defamatory publication. *Dun & Bradstreet, Inc. v. Green-*

moss Builders, Inc., 472 U.S. 749, 757-63, 105 S.Ct. 2939, 2944-47, 86 L.Ed.2d 593 (1985); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351-52, 94 S.Ct. 2997, 3012-13, 41 L.Ed.2d 789 (1974); and *see generally* 35 Words and Phrases, "Public Figure" (1963). To be the public figure whom publishers are privileged to defame, absent malice, the pair must at least have been involved in the public controversy before the defamatory statement was published. *Hutchinson v. Proxmire,* 443 U.S. 111, 134-35, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411 (1979); *Vera Sims Ford, Inc. v. Hagel,* 42 Wash, App. 675, 713 P.2d 736, 739 (1986). Hustler relies in part for its characterization of Spence as a "public figure" upon the publication of Spence's books, especially *Trial by Fire* (concerning a case of his against Penthouse magazine) which was not published until 1986 and a second book *And Justice for None* which was not published until 1989. Thus, in 1985, at the time the Hustler article was published, Spence may not have been a "public figure" for First Amendment purposes who had entered the fight against pornogrpahy as Hustler claims.

A professional person, who may be a "public figure" for some purposes, should be free to offer his services to a client as a private professional without being subjected to public figure defamation. To hold otherwise would have a chilling effect upon attorneys who undertake to represent clients in difficult, unpopular, high profile, or sensational types of cases. We can foresee also detriment to these potential clients being unable to employ skilled, capable, specialist lawyers who have achieved some fame and reputation because of their legal and trial abilities and are claimed to have achieved public figure status. Under these circumstances, we hold that a person situated, as Spence is here, is not subject to defamation without recourse. We see no threat to the principles of the First

Amendment which we, as a court of last resort, have upheld with great vigor, but there must, as the United States Supreme Court has itself held, be some balance between Freedom of Speech and Press and other interests of constitutional proportions which are of equal importance. Free speech cannot equate with the freedom to intimidate, destroy and defame an advocate seeking to represent a client.

[6] In summary, our review of the propriety of summary judgment is well-established. *Case v. Goss*, 776 P.2d 188, 190-91 (Wyo.1989). In this case the district court granted summary judgment on the basis of the pleadings alone. *See, Cordova v. Gosar*, 719 P.2d 625 (Wyo.1986). Spence agreed that he was a public figure, and he may be for some purposes. He is not, however, a public figure if his involvement in the controversy is only as a lawyer representing a client. Although we decide this case on grounds not fully briefed or argued to the court, we have held on several occasions that we may decide a case on any ground that justice requires. *White v. Fisher,* 689 P.2d 102, 105 (Wyo.1984). On remand, the parties will have ample opportunity to establish whether Spence is a public or private figure. Thus, our holding is that a lawyer who is merely advocating for a famous or controversial client is not a public figure merely because he has taken on the cause as advocate. We hold that there is not a special opinion privilege, and, under the circumstances of this case and the principles enunciated in *Gertz*, 418 U.S. 323, 94 S.Ct. 2997, and *Milkovich*, ____ U.S. ____, 110 S.Ct. 2695, Spence may have his day in court.

We next address Hustler's cross-appeal in which these issues concerning disqualification of Spence's counsel are presented:

"1. Whether an attorney's filing of a lawsuit for libel and related torts based upon an alleged charge of unprofessional and unethical conduct renders that lawyer's partners and associates likely witnesses as to the truth or falsity of the challenged statement.

"2. Whether an attorney's filing of a lawsuit for libel and related torts based upon an alleged charge of unprofessional and unethical conduct renders that lawyer's partners and associates likely witnesses as to the existence of any reputational harm allegedly suffered by the lawyer.

"3. Whether an attorney's filing of a lawsuit for intentional infliction of emotional distress renders that lawyer's partners and associates likely witnesses as to the nature and severity of the alleged emotional distress.

"4. Whether a lawyer's partners and associates must be disqualified from representation of the lawyer, pursuant to Rule 3.7 of the Wyoming Rules of Professional Conduct, when those partners and associates are likely to be called as witnesses in the case."

Spence's response to these arguments is this:

"1. Whether Gary L. Shockey, partner of Gerry L. Spence, may act as Mr. Spence's counsel, pursuant to the authority in Rule 3.7, Wyoming Rules of Professional Conduct for Attorneys at Law, which provides, in part, that 'A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness [unless precluded from doing so by Rule 1.7 or Rule 1.9].'

"2. Whether other members of Mr. Spence's firm may be witnesses.

"3. Whether [Hustler has] utterly failed to make necessary evidentiary showings with respect to issues 1 and 2."

[7] Hustler contends that Spence needs to call as witnesses members of the firm, including Shockey. The areas in which Hustler contends that the firm members' testimony is needed include the truth or falsity of challenged published statements, whether Spence suffered any reputational harm, and the nature and severity of any emotional distress. Because of this alleged need, Hustler contends that Shockey cannot continue as Spence's trial counsel.

Determination of this issue is governed by Rules of Professional Conduct for Attorneys at Law, Rule 3.7, which became effective on January 12, 1987. Rule 3.7 provides:

"(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

"(1) the testimony relates to an uncontested issue;

"(2) the testimony relates to the nature and value of legal services rendered in the case; or

"(3) disqualification of the lawyer would work substantial hardship on the client.

"(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

Rules 1.7 and 1.9 pertain to conflict of interest between lawyers and their clients and between lawyers and their former clients. Hustler concedes that no conflicts of interest under those rules exist here. One function of Rule 3.7(b) is to make clear that 3.7(a) is personal to the

client's trial advocate and will not be imputed to other members of the firm. 1 G. Hazard & . W. Hodes, *Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 684 (1990). Without a conflict of interest, Rule 3.7(b) does not enter into the issue of whether Shockey may continue as counsel regardless of whether other members of the firm will testify. Therefore, we conclude that Rule 3.7(b) has no application to the facts of this case.

Rule 3.7 superseded Disciplinary Rules 5-101(B) and 5-102 when this court adopted the Rules of Professional Conduct, replacing the Code of Professional Responsibility. DR 5-101(B) stated:

> "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> "(1) If the testimony will relate solely to an uncontested matter.
>
> "(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> "(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> "(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

DR 5-102 stated:

> "(A) If, after undertaking employment in contemplated or pending litigation, a lawyear learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5101(B)(1) through (4).
>
> "(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

[8] The Code of Professional Responsibility might have mandated disqualification, but that is an issue we need not consider here. The new Rules of Professional Conduct, which govern this case, are less restrictive than the code in this area.
ABA/BNA Lawyer's Manual on Professional Conduct 61:501 (1989). *See* Wydick, *Trial Counsel as Witness: The Code and The Model Rules,* 15 U.C.Davis L.Rev. 651 (1982). Although Rule 3.7 recognizes the threat of prejudice against the opposing party when the roles of trial advocate and witness are combined, one of the goals of the rule is to minimize the use of the rule as a tactical weapon by adversary counsel. Wyoming Rules of Professional Conduct Rule 3.7, comments 1, 2; Wydick, 15 U.C.Davis L.Rev. at 677. Rule 3.7 protects the right of a party to counsel of his choice. *Security General Life Ins. Co. v. Superior Court,* 149 Ariz. 332, 718 P.2d 985, 988 (1986). Disqualification motions are " 'often simply com-

mon tools of the ligation process * * * used * * * for purely strategic purposes.' " *McElroy v. Gaffney,* 129 N.H. 382, 529 A.2d 889, 894 (1987) (quoting Van Graafeiland, *Lawyer's Conflict of Interest — A Judge's View* (Part II), N.Y.L.J. July 20, 1977 at 1, col. 2). Such motions to disqualify chosen counsel are disfavored, especially when the motion is based on what another party ought to do in choosing its witnesses for trial. *Mitts & Merrill, Inc. v. Shred Pax Corp.,* 112 F.R.D. 349, 353-54 (N.D.Ill.1986). Hustler's motion to disqualify Shockey and other members of the Spence, Moriarity & Schuster law firm is for all appearances just such a diversionary motion.

Furthermore, Hustler has made no showing that Shockey is "likely to be a necessary witness" as Rule 3.7(a) requires. Simply to assert that the attorney will be called as a witness is not enough. *Humphrey on behalf of State v. McLaren,* 402 N.W.2d 535, 541 (Minn.1987). If the evidence can be produced in some other effective way, the attorney is not a necessary witness. *Id.* Thus, Hustler's own argument that other members of the firm can be called to testify to the matters to which Shockey can testify defeats the contention that Shockey is a necessary witness. For these reasons, we affirm the order of the district court denying Hustler's motion to disqualify Shockey, as well as other members of the Spence firm.

The order of the district court granting summary judgment to Hustler is reversed and remanded to the district court for further proceedings consistent with this opinion. The order of the district court refusing to disqualify members of the Spence firm from representing Spence in the prosecution of this action is affirmed.

THOMAS, J., files a specially concurring opinion.

MACY and GOLDEN, J., filed separate opinions concurring in part and dissenting in part.

THOMAS, Justice, concurring specially.

I agree that the order of the district court granting summary judgment to the appellees in this case must be reversed. I am satisfied that the order of the district court refusing to disqualify members of the Spence firm from representing Spence should be affirmed. I cannot, however, join the rationale for reversal represented by the holding that Spence is not a "public figure" merely because his role in the predicate to the allegedly defamatory publication was that of a legal advocate. That is precisely the role that results in Spence being a "public figure," and it is clear that, both in the trial court and in his argument to this court, Spence stipulated and conceded that he is, indeed, a "public figure."

Even so, there exists ample justification to reverse the summary judgment entered by the trial court. The philosophical question posed in this case is whether the First Amendment to the Constitution of the United States constitutes a universal smile sufficient to ward off the Virginian's unholstered pistol.[1] In this instance, the legal

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[1]In *The Virginian*, his classic novel about the American cowboy and life in the West, Owen Wister incorporates this marvelous vignette:

"* * * Though folding doors I passed from the bar proper with its bottles and elk head back to the hall with its various tables. I saw a man sliding cards from a case, and across the table from him another man laying counters down. Near by was a second dealer pulling cards from the bottom of a pack, and opposite him a solemn old rustic piling and changing coins upon the cards which lay already exposed.

"But now I heard a voice that drew my eyes to the far corner of the room.

" 'Why didn't you stay in Arizona?'

issue tracks the philosphical question, and there is nothing in the record to indicate that Hustler was "smiling." Is one entitled, as a matter of law, to impugn another with whatever lewd, obscene, and profane vilification, revilement, defilement, or slur one chooses by virtue of the right of free speech embraced by the First Amendment to the Constitution of the United States and Article 1, Section 20 of the Constitution of the State of Wyoming? The district court answered "Yes" to that question by granting the motion for summary judgment presented on behalf of the appellees. Our answer appropriately can be "No."

Words, such as those published in this case, indeed *"are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighed*

"Harmless looking words as I write them down here. yet at the sound of them I noticed the eyes of the others directed to that corner. What answer was given to them I did not hear, nor did I see who spoke. Then came another remark.

" 'Well, Arizona's no place for amatures.'

"This time the two card dealers that I stood near began to give a part of their attention to the group that sat in the corner. There was in me a desire to leave this room. So far my hours at Medicine Bow had seemed to glide beneath a sunshine of merriment, of easy-going jocularity. This was suddenly gone, like the wind changing to north in the middle of a warm day. But I stayed, being ashamed to go.

"Five or six players sat over in the corner at a round table where counters were piled. Their eyes were close upon their cards, and one seemed to be dealing a card at a time to each, with pauses and betting between. Steve was there and the Virginian; the others were new faces.

" 'No place for amateurs,' repeated the voice; and now I saw that it was the dealer's. There was in his countenance the same ugliness that his words conveyed.

" 'Who's that talkin'?' said one of the men near me, in a low voice.

by the social interest in order and morality." Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942)) (emphasis added). The implication of the *Chaplinsky* holding is that the full range of constitutional protection does not extend to such expressions as this record discloses. Whether, however, a defense to the claims of defamation or intentional infliction of emotional distress can be premised upon the right to publish an opinion depends, in an instance such as this, upon a determination that the statement is one of opinion rather than one of fact, just as the decision in *Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), depended upon whether, in fact, the statement was parody rather than fact. The issue is one that appropriately should be resolved by a jury, and thus summary judgment is not appropriate.

I add only the suggestion that in an instance such as this, in which the only purpose of the published language is to inflict injury or offer insult, true malice is present.

" 'Trampas.'

" 'What's he?'

" 'Cow-puncher, bronco-buster, tin-horn, most anything.'

" 'Who's he talkin' at?'

" 'Think it's the black-headed guy he's talking at.'

" 'That ain't supposed to be safe, is it?'

" 'Guess we're all goin' to find out in a few minutes.'

" 'Been trouble between 'em?'

" 'They've not met before. Trampas don't enjoy losin' to a stranger.'

" 'Fello's from Arizona, yu' say?'

" 'No. Virginia. He's recently back from havin' a look at Arizona. Went down there last year for a change. Works for the Sunk Creek outfit.' And then the dealer lowered his voice still further and said something in the other man's ear, causing him to grin. After which both of them looked at me.

Concededly, this is not the technical sort of actual malice that is described as actual knowledge of falsehood or reckless disregard of the truth in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), but that definition relates to what purport to be statements of fact. When the claim that the statement is an expression of opinion is injected, that technical definition of "actual malice" may no longer pertain, and the traditional definition of malice, i.e., the intention or desire to harm another, may be invoked. If the latter definition is applicable, there should be no necessity to determine whether the object of the published comment is a public figure. There is no newsworthy value of such expressions of opinion.

MACY, Justice, concurring in part and dissenting in part.

"There had been silence over in the corner; but now the man Trampas spoke again.

" 'And ten,' said he, sliding out some chips from before him. Very strange it was to hear him, how he contrived to make those words a personal taunt. The Virginian was looking at his cards. He might have been deaf.

" 'And twenty,' said the next player, easily.

"The next threw his cards down.

"It was now the Virginian's turn to bet, or leave the game, and he did not speak at once.

"Therefore, Trampas spoke. 'Your bet, you son-of-a-—.'

"The Virginian's pistol came out, and his hand lay on the table, holding it unaimed. And with a voice as gentle as ever, the voice that sounded almost like a caress, but drawling a very little more than usual, so that there was almost a space between each word, he issued his orders to the man Trampas:—

" 'When you call me that, smile!' " Wister, *The Virginian* (1902) (emphasis in original).

I concur in the decision to affirm the order denying the motion to disqualify Spence's counsel and the decision to reverse the summary judgment. I disagree, however, with the majority's analysis regarding the alleged defamatory statements and propose an alternate guideline for the district court.

Actionable and Nonactionable Statements

With respect to the question of whether the statements in the published article are actionable, I agree with most of Justice Golden's analysis. I part company, however, at the point where he determines, as a matter of law, that all the statements are nonactionable opinion or rhetorical hyperbole. *See* 816 P.2d at 790 (Golden, J., concurring in part and dissenting in part). This case should be remanded for a factual determination of whether some of the statements are actionable factual assertions. If those statements are statements of opinion relating to matters of public concern which contain a provably false factual connotation and if they can reasonably be interpreted as stating actual facts, then they are actionable factual assertions. *Milkovich v. Lorain Journal Co.*, — U.S. —, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Otherwise, the statements are nonactionable opinion or rhetorical hyperbole.

While the United States Supreme Court has not declared that the determination of whether a statement is an actionable factual assertion or a protected opinion is a question of law or a question of fact, several courts have utilized principles articulated by the Supreme Court to hold that *close calls* should be turned over to a fact finder. *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (1991); *Flotech, Inc. v. E.I. Du Pont de Nemours & Company*, 814 F.2d 775 (1st Cir.1987); *Aldoupolis v. Globe Newspaper*

Company, 398 Mass. 731, 500 N.E.2d 794 (1986); *Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County*, 22 Cal.3d 672, 150 Cal.Rptr. 258, 586 P.2d 572 (1978). In *Yetman*, 811 P.2d at 331, the Arizona Supreme Court stated:

> [O]nly in the clearest cases may courts, applying the principles laid down in *Milkovich*, determine as a matter of law, that the assertions before them state or imply actual facts and are therefore entitled to no constitutional protection. *See White v. Fraternal Order of Police*, 909 F.2d 512, 523 (D.C.Cir.1990); *Beasley v. St. Mary's Hosp.*, 200 Ill.App.3d 1024, 146 Ill.Dec. 714, 720, 558 N.E.2d 677, 683 (1990). In other cases, it will be clear that the assertions at issue employ "loose, figurative or hyperbolic language," and cannot reasonably be interpreted as stating or implying actual facts.

The court held that, in cases involving statements to which reasonable people might give conflicting yet plausible interpretations, a fact finder should determine the nature of the statements. *Id.*

Under the Arizona Supreme Court's standard, Hustler's article must be analyzed to determine which statements are, as a matter of law, either protected or unprotected and which statements should be examined by a fact finder. Justice Golden lays out the following four-prong test which governs that determination:

> 1. The full context of the statements in the article since other unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content;

2. The broad social context or setting within which the allegedly defamatory statement appears;

3. The common usage or meaning of the specific language of the challenged statements;

4. Whether the statement is capable of being verified, that is, objectively characterized as true or false.

816 P.2d at 785 (Golden, J., concurring in part and dissenting in part). Applying that test, I agree with Justice Golden's conclusion that "vermin-infested turd dispensers," "shameless shitholes," "hemorrhoidal types," "[a]sshole," "reeking rectum," and "parasitic scum-suckers" are either expressions of opinion or rhetorical hyperbole. The statement, "In her latest publicity-grab, Dworkin has decided to sue HUSTLER," is not directed toward Spence and, therefore, is not relevant to his case.

The character of the following statements is not clear and should be determined by a fact finder:

1. Spence is a lawyer and lawyers "are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets."

2. Spence's "log-cabin image is * * * phony."

3. "Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes."

4. "This case is a nuisance suit initiated by Dworkin."

A reasonable jury could conclude, that statements 1, 2, and 3 imply that Spence intentionally deceives the legal

system for monetary gain. Such a conclusion would give rise to an actionable assertion of fact. The same jury could also decide that those statements do not suggest the existence of provable facts or that they are merely rhetorical hyperboles which disparage Spence. In that case, the statements would be protected. Statement 4 is a problem because it refers to Dworkin's suit as a "nuisance suit." While some readers may not consider that phrase in terms of professional ethics, an attorney who files a nuisance suit can be punished pursuant to Rule 3.1 of Wyoming's Rules of Professional Conduct for Attorneys at Law. Hence, the filing of a nuisance suit can be a provable fact, and a reasonable jury could conclude that statement 4 connotes the existence of such a fact. In contrast, a reasonable jury could also find that Hustler's statement is simply an expression of its opinion that Dworkin is not entitled to a recovery and not an assertion that Spence committed an ethical violation. I would send all four statements back to the district court for a factual determination of their character.

Spence's Status as a Public Figure.

The majority opinion concludes that the issue of whether Spence is a public figure or a private individual should be remanded for a determination by a fact finder. 816 P.2d at 776. I agree with that conclusion and emphasize that a lawyer should not be deemed a public figure just because he takes on a notorious case or represents a client who is a public figure. I also write to advocate for the use of a standard — when addressing the public figure versus private individual issue — similar to the standard expressed in the previous section of this opinion. In cases which, under the principles enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), involve a person who is clearly a

public figure or a private individual, the court may determine the person's status as a matter of law. *See Adams v. Frontier Broadcasting Company,* 555 P.2d 556 (Wyo.1976). Otherwise, the factual question should be presented to and decided by a fact finder.

GOLDEN, Justice, concurring in part and dissenting in part.

Although I concur in this court's affirmance of the trial court's order denying *Hustler's* motion to disqualify Spence's counsel, I dissent to that part of the majority's opinion which reverses the trial court's order granting *Hustler's* motion for summary judgment.

The district court applied controlling authority and held correctly as a matter of law the *Hustler* article was not defamatory. The majority purports to remand in light of *Milkovich v. Lorain Journal*, — U.S. —, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Yet, despite its acknowledgment that the "United States Constitution, as interpreted by the United States Supreme Court, is the supreme law of the land," the majority creates and applies an analytical framework in conflict with the federal constitutional authority restated in *Milkovich* and labels the article's contents as "clearly defamatory." With that naked assertion and the reversal and remand for "further proceedings consistent with this opinion," I am uncertain what those further proceedings should entail, and I suspect the trial court judge will also be uncertain. It appears the majority has not only reversed summary judgment for *Hustler*, but has decided the article is defamatory and strongly suggests a resolution of Spence's status for purposes of a defamation action.

I would affirm the district court's grant of summary judgment as the *Hustler* article, by application of federal

constitutional authority recapitulated in *Milkovich*, is a nonactionable statement of editorial opinion which enjoys absolute protection under the first amendment of the United States Constitution. Assuming the article was not absolutely protected, I would hold that Spence is a public figure for all purposes and must provide evidence of actual malice even were he to identify any "provably false factual connotation[s]" *Milkovich*, ____ U.S. at ____, 110 S.Ct. at 2706, 111 L.Ed.2d at 18, in the *Hustler* piece. He is a public figure by his own admission, by the evidence he produced during discovery, by his counsel's concessions in the trial court and in this court, and by overwhelming legal authority.

Finally, I would have dismissed with prejudice the appeal because Spence failed to include appropriate page references to the record in his statement of the facts relevant to the issues presented for review. W.R.A.P. 5.01(3). This court has previously cautioned litigants practicing before it to comply with this well-known and easily followed rule. *Jung-Leonczynska v. Steup*, 782 P.2d 578, 581 (Wyo.1989); *V-1 Oil Company v. The Honorable Robert B. Ranck*, 767 P.2d 612, 613 (Wyo.1989). This Court summarily dismissed with prejudice a pro se litigant's appeal after oral argument for an identical rule violation. *Condict v. Condict*, No. 89-51, (Wyo., Jan. 24, 1990) (order dismissing appeal), *reh. denied*, Feb. 7, 1990. I see no reason for not applying the dismissal with prejudice sanction in this case. This court's failure to apply it here justifiably exposes the court to accusations of patent unfairness for employing an unwritten double standard.

I shall now flesh out my views regarding the allegedly defamatory nature of the article about Spence and his status as a public figure. Keep in mind the basic libel

calculus: "statements that cannot 'reasonably be interpreted as stating actual facts' " and "statement[s] of opinion relating to matters of public concern which [do] not contain . . . provably false factual connotation[s] will receive full constitutional protection." *Milkovich*, ____ U.S. at ____, 110 S.Ct. at 2706, 111 L.Ed.2d at 18. If the alleged defamation is not absolutely protected by the first amendment, a "private figure" who has been allegedly libeled by the publication of a false statement of fact on a matter of public concern may recover by proving the defendant was negligent; however, a "public figure" who has been libeled by the publication of a false statement of fact on a matter of public concern may recover only by proving that the defendant published the false statement of fact either with knowledge that it was false or with reckless disregard of whether or not it was false. *Id.*, ____ U.S. at ____, 110 S.Ct. at 2706-07, 111 L.Ed.2d at 19. *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Ollman v. Evans*, 750 F.2d 970 (D.C.Cir.1984); *Lewis v. Time, Incorporated*, 710 F.2d 549 (9th Cir.1983); *MacGuire v. Harriscope Broadcasting*, 612 P.2d 830 (Wyo.1980); *Adams v. Frontier Broadcasting*, 555 P.2d 556 (Wyo.1976).

HUSTLER'S ARTICLE AS NONACTIONABLE OPINION

The majority calls *Milkovich* the most important libel law decision since the cases of *New York Times* and *Curtis Publishing.* However, it fails to analyze the *Hustler* article about Spence in light of the holding in *Milkovich* that defamation must be based on a "provably false factual connotation" and does not apply to "statements that cannot reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich,* ____ U.S. at ____, 110 S.Ct. at 2706, 111 L.Ed.2d at 19. *See, Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Letter Carriers v. Austin;* (use of the word "traitor" in literary definition of a union "scab" was not a basis for a defamation action since word was used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"); and *Greenbelt Cooperative,* 398 U.S. at 14, S.Ct. at 1542, 26 L.Ed.2d at 15 (holding that the word "blackmail" as used to characterize a real estate developer's negotiations with a local city council for a zoning ordinance, the Court observed that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable").

In *Milkovich*, the Supreme Court analyzed statements in a newspaper column to determine whether or not a reasonable factfinder could conclude that the headline of the article and nine passages in the article implied an assertion that wrestling coach Milkovich perjured himself in a judicial proceeding. It also addressed the *"type* of speech" at issue, reaffirming that where "loose, figurative, hyperbolic language" is used the statement cannot rea-

sonably be interpreted as stating facts. *Milkovich,* ____ U.S. at ____, 110 S.Ct. at 2707, 111 L.Ed.2d at 19. The *Milkovich* analysis relies on "the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Id.,* ____ U.S. at ____, 110 S.Ct. at 2709, 111 L.Ed.2d at 21 (Brennan, J. dissenting); *see* the majority opinion ____ U.S. at ____, 110 S.Ct. at 2707, 111 L.Ed.2d at 19-20, for these indicia. Inexplicably the majority eschews this principled and controlling analysis and instead creates its own methodology from the common law construct of "fair comment" and the unrelated "fighting words" doctrine of *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Milkovich discusses "fair comment" as historical background, noting that it was the device used to achieve a balance of rights at common law. *Milkovich,* ____ U.S. at ____, 110 S.Ct. at 2703, 111 L.Ed.2d at 14. The concept is overborne by the series of Supreme Court decisions grounded in the first amendment that began with *New York Times* and that has continued through *Milkovich.* These decisions have enunciated and refined the federal constitutional rule that displaces state common law "fair comment" out of concern that a state law "rule compelling the critic [of public figures or persons] to guarantee the truth of all his factual assertions would then protected speech." *Milkovich,* ____ U.S. at ____, 110 S.Ct. at 2703, 111 L.Ed.2d at 15. Fair comment is thus limited by "the supreme law of the land," and it is puzzling that the majority chooses to seize on it as significant to the *Milkovich* holding.

I have equal difficulty accepting the majority's reliance on the "fighting words" doctrine from *Chaplinsky.* I strongly disagree with the majority's conclusion that *Chaplinsky,* "intimates' that a civil libel action lies "for redress of the kind of grossly defamatory statements as those at issue here." In the early fifty years since *Chaplinsky* was decided, it has never been used by any court for that purpose. The majority opinion cannot cite to one case where that has happened. Tellingly, no United States Supreme Court case has ever "intimated" what the majority now "intimates." *Milkovich* does not once mention *Chaplinsky,* not even in a footnote.

According to the highly authoritative work, *The Constitution of the United States of America — Analysis and Interpretation,* 1099 (H. Killian & L. Beck, 1987), "Chaplinky * * * [is] of little vitality." This work comments:

> Over the last two decades, the decided cases have reflected a fairly consistent and sustained march by the [United States Supreme] Court to the elimination of or a severe narrowing of the "two-tier" doctrine and protection of much expression that hitherto would have been held absolutely unprotected * * * fighting words, defamation, and obscenity * * *

Id. at 1094-95.

Indeed that march is reflected in *Lucas, et al. v. Arkansas,* 416 U.S. 919, 94 S.Ct. 1917, 40 L.Ed.2d 277 (1974); *Eaton v. City of Tulsa,* 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974); *Lewis v. City of New Orleans,* 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974); *Gooding v. Wilson,* 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 405 (1972). In all of these cases various vulgar and profane epithets and insults were deemed not included within the

category of "fighting words." *Chaplinsky* is clearly inapposite.

Following *Milkovich,* I believe a proper defamation analysis must address the following four factors to determine whether the statement either cannot "reasonably be interpreted as stating actual facts" or, if it is otherwise believable, contains any "provably false factual connotations:"

1. The full context of the statements in the article since other unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content;

2. The broad social context or setting within which the allegedly defamatory statement appears;

3. The common usage or meaning of the specific language of the challenged statements;

4. Whether the statement is capable of being verified, that is, objectively characterized as true or false.

In this analysis I would keep in mind Justice Holmes' epigram: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner,* 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918) (quoted in *Ollman,* 750 F.2d at 978 n.13).

As I begin the analysis,[1] I am reminded by Spence's appellate brief that there are only a few selected state-

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[1]The subject matter of our analysis, the allegedly defamatory article, is appended to this dissent in the form in which the article appeared.

ments contained in the entire article that he complains about. I would categorize these selected statements as follows:

The Word "Asshole" and Its Variations

- "vermin-infested turd dispenser"
- "shameless shitholes"
- "hemorrhoidal types"
- "reeking rectum"

Abusive Words

- "Members of that group of parasitic scum-suckers often referred to as lawyers."

Alleged False Statements of Fact

- Spence is a lawyer and lawyers "are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets."
- His "log-cabin image is as phony as a cum-dripping whore's claim of virginity."
- ["Considering that Dworkin advocates bestiality, incest and sex with children,] it appears * * * Spence is more interested in promoting his bank account that the traditional values he'd like us to believe he cherishes."
- "In her latest publicity-grab, Dworkin has decided to sue *Hustler* * * * ."
- "This case is a nuisance suit initiated by Dworkin * * * ."

Among the passages in the article that Spence does not complain about are these:

• "Spence dudes himself up in western duds and calls himself a 'country lawyer' * * * ."

• He is "worth millions and owns a 35,000 acre ranch."

• "Spence's claim to fame is that in the name of 'the little guy' he's won some mighty big judgments against some mighty big corporations: $10.5 million against Kerr-McGee (the famous Karen Silkwood case), $26.6 million against Penthouse and $52 million against McDonald's. He'd like to add *Hustler* to the list * * * for a whopping $150 million. His client is 'little' militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right * * * Dworkin seems to be an odd bedfellow for 'just folks,' 'family values' Spence. After all, Dworkin is one of the most foul-mouthed, abrasive man-haters on earth * * * ."

• "Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of country for this lawyer."

• "The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all * * * Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses."

The first question considered, and the one determined against Spence by the district court, is whether reasonable readers would interpret the *Hustler* piece as stating

actual facts, or whether it would be read as "rhetorical hyberbole." This is labelled in *Milkovich* as the "*type* of speech" standard. *Milkovich*, ____ U.S. at ____, 110 S.Ct. at 2704, 111 L.Ed.2d at 16. To make this determination it is necessary to consider the full extent of the statements in the article, the broad social context within which those statements appear, and the common meanings of the language used.

1. *Context of the Statement in the Article*

I am convinced, as was the district court, that the average reader who reads *Hustler's* "Bits and Pieces" column on the "Asshole of the Month" award is fully aware that the statements found there are not "hard news." Readers of that magazine expect that *Hustler's* writers will make strong opinionated statements in the confines of their own publication, a well-recognized home of opinion and comment. That proposition is inherent in the very notion of a "Bits and Pieces" page which is akin to an editorial opinion page. That the article appears under that heading "Bits and Pieces" and is a regular monthly feature renders it cautionary in nature; that is, the average reader is served notice that what is said cannot be read as stating actual facts. *Ollman*, 750 F.2d at 987. The general tenor of the feature also serves to emphasize it is a vulgar "expression of contempt" and not a serious statement of fact. Its scatological litany is more like an insult hurled across a barroom or schoolyard than a statement of fact.

2. *Broad Social Context of the Article*

For nearly 2,000 years individuals have published and circulated in one form or another sharp and biting comments on the role of lawyers. I have included a brief historical sampler:

Luke 11:46, in which Jesus says: "Woe unto you also, ye lawyers, for ye lade men with burdens grievous to be borne and ye yourselves touch not the burdens with one of your fingers." Radin, *The Ancient Grudge: A Study in the Public Relations of the Legal Profession*, 32 Va.L.Rev. 734, 745-46 (1946).

Shakespeare's Henry VI where Dick the Butcher said, "The first thing we do, let's kill all the lawyers." Radin, *supra*, at 747.

Jonathan Swift in Chapter V of *Gulliver's Travels*, at 295-97 (Oxford ed. 1919): "[T]here was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves. * * * In pleading they studiously avoid entering into the merits of the cause, but are loud, violent, and tedious in dwelling upon all circumstances which are not the purpose. * * * [T]hat in all points out of their own trade, they were the most ignorant and stupid generation among us, the most despicable in common conversation, avowed enemies to all knowledge and learning, and equally disposed to pervert the general reason of mankind in every other subject of discourse, as in that of their own profession."

Sir Thomas More, on exclusion of lawyers from his Utopia "because they are 'a sort of people, whose profession it is to disguise matters.' " R. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 Cal.L.Rev. 379 (1987) (quoting from T. More, *Utopia* 128 (G. Burnet Trans. 1821) (1516)).

Samuel Coleridge's verse: "He saw a lawyer killing a viper on a dunghill hard by his own stable; And the Devil smiled, for it put him in mind of Cain and his

brother Abel." Post, *supra*, at 379 n. 3 (quoting from S. Coleridge, "The Devil's Thoughts," *Complete Poetical Works* 320 (1912)).

Carl Sandburg's poem, "The Lawyers Knew Too Much," included these sentiments:

In the heels of the higgling lawyers

Too many slippery ifs and buts and howevers,

Too much herein before provided whereas,

Too many doors to go in and out of.

When the lawyers are through

What is there left, Bob?

Can a Mouse Nibble at it

And find enough to fasten a tooth in?

Why is there always a secret singing

When a lawyer cashes in?

Why does a hearse horse snicker

Hauling a lawyer away?

Radin, *supra*, at 751 n. 51 (quoting from *Smoke and Steel*, 85-86 (1921); K. Llewellyn, *The Bramble Bush* (1930)).

The contemporary lawyer's negative public image is further revealed in other articles and books. Illustrative are: Lawscope, *Public: 'Shyster' OK — If He's On Your Side*, 67 A.B.A.J. 695-96 (June 1981); Jost, *What Image Do We Deserve*, 74 A.B.A.J. 47-51 (Nov. 1988); M. Bloom, *The Trouble With Lawyers*, (1968); *Verdicts on Lawyers* (R. Nader & M. Green, 1976); and M. McCormack, *The Terrible Truth About Lawyers* (1987). Finally, I cannot avoid reference to ever popular lawyer jokes that are repeated and discussed in the journals of our profession.

Sandberg favored lawyers with this joke: "Have you a criminal lawyer in this burg? We think so, but we haven't been able to prove it on him." (quoted in C. Selinger, *Criminal Lawyers' Truth: A Dialogue on Putting the Prosecution to its Proof on Behalf of Admittedly Guilty Clients*, 3 The Journal of the Legal Profession 57 (1978)). I believe this is tame comment by today's standards.

An apt analogy to the public's perception of the lawyer's role in society is found in the public's perception of the umpire's role in the great American pastime of baseball. *Parks v. Steinbrenner*, 131 A.D.2d 60, 520 N.Y.S.2d 374 (1987), was a defamation action involving "one of the most colorful of American traditions — the razzing of the umpire." *Id.* 520 N.Y.S.2d at 375. Parks, an American League baseball umpire, alleged that George Steinbrenner, controversial former principal owner of the New York Yankees, had defamed him in a press release following a Yankee game in which Parks officiated. The press release contained such statements as: "My people tell me that he is not a capable umpire"; "He doesn't measure up"; "it was ludicrous for Parks to eject two Yankee players on plays 'he misjudges' "; "I labeled him and several of the umpires as 'scabs' because they worked during the strike"; and "he is not capable of handling his job."

In considering the historical perspective, the *Parks* court noted that harsh insults directed against the umpires are accepted commonplace occurrences in baseball. *Id.* 520 N.Y.S.2d at 376-77. Viewing Steinbrenner's press release in this historical and contemporary context, the court easily concluded that the allegedly defamatory remarks "would be perceived by the average reader as statement of opinion, and not fact." The remarks "are readily understood to be the kind of 'rhetorical hyperbole' that generally accompany the communication of displea-

sure at an umpire's calls." *Parks,* 520 N.Y.S.2d at 377. The court continued:

> Moreover, on its face, and from its tone, it is immediately evident that the statement represents the view of the owner of an embattled baseball team who is obviously chafing at "the team's [poor] play this season", which has been exacerbated by a weekend of injuries and ejections of players, and who is venting his frustrations in the venerated American tradition of "baiting the umpire". Indeed, even if the assertions in the statement implying that plaintiff was imcompetent and biased in performing his duties were to be viewed as statements of fact, it is questionable whether they could be construed as defamatory — i.e., exposing the plaintiff to public contempt, ridicule, aversion and disgrace and inducing an evil opinion of him in the minds of right thinking persons (*Rinaldi v. Holt, Rinehart & Winston, Inc., supra,* 42 N.Y.2d [369] at p. 370, 397 N.Y.S.2d 943, 366 N.E.2d 1299 [1977]) — in light of generally "critical" attitudes which baseball umpires, in any event, ordinarily appear to inspire in both the game's fans and its participants.

Parks, 520 N.Y.S.2d at 377. With a few minor adjustments in the quoted material, the court might just as well be commenting on *Hustler's* statement about Spence. *Hustler's* statement represents the view of the owner of an embattled magazine that is obviously chafing at an attack on its freedom of speech by Dworkin exacerbated by the legal tactics of her attorney Spence, one of America's most skillful and flamboyant lawyers. *Hustler* is venting its frustrations in the venerated American tradition of "bashing the lawyer." In light of the generally "critical" attitudes which lawyers, especially one's opponent, ordi-

narily appear to inspire in litigation's participants, these statements simply cannot, as a matter of law, be construed as defamatory.

Another apt analogy is found in *Myers v. Boston Magazine Company, Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980), a case involving a defendant magazine's best and worst sports awards. The magazine bestowed its award on Myers as the "worst" sports announcer in Boston. The article stated that he was "enrolled in a course for remedial speaking." *Id.* 403 N.E.2d at 377. In holding that the article could not reasonably be understood as an assertion of fact, the court found that the article "does partake of an ancient, lively tradition of criticizing, even lampooning, performers. To sharpen the bite of his rapier, a critic may resort to caricature or rhetorical license. So long as he excludes false statements of fact from his arsenal, the Constitution will shield him." *Id.* 403 N.E.2d at 381.

Whether we care for it or not, lawyer bashing is a time honored tradition, which this article simply continues in an energetic and exceptionally vulgar "style."

3. *Common Usage or Meaning of the Language Used.*

With respect to the common usage or meaning of the specific language of the challenged statements, I would quickly dispose of those allegedly defamatory statements falling in the categories designated "The word 'asshole' and its variations" and "abusive words."[2] Under prevailing first amendment law, such abusive epithets, vulgari-

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[2]In P. Farb, *Word Play* (1974), the author first informs us that "People living in western cultures have long looked upon their verbal taboos as hallmarks of their advanced 'civilization.' " *Id.* at 78. Then, he reminds that

ties and profanities are nonactionable. R. Smolla, *Law of Defamation,* § 4.03, pp. 4-9 to -10 and § 6.12[10], p. 6-52 (1989). *See* cases cited therein. Their ad hominem nature easily identifies them as rhetorical hyperbole, which, as a matter of law, can not reasonably be understood as statements of fact. Consequently, they are privileged. Smolla, *supra,* § 4.04[1] at 4-11 And, from an ninety-nine year old case, "[t]he language, 'You are a God damn low-down son of a bitch,' * * * is not 'obscene and vulgar [language].' " *Shields v. State,* 89 Ga. 549, 16 S.E. 66 (1892).

These three considerations all point emphatically toward a finding that *Hustler's* attack on Spence is the sort of

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> [m]any scholars have concluded that prohibiting the use of taboo words is not a hallmark of refinement and civilization, but rather a wound in the body of language. When a speech community isolates certain words and designates them as taboo, it debases natural things like sexual intercourse and the bodily functions; it spreads guilt by causing people to repress words and even any references at all to the natural acts of the body these words describe; it encourages the exhibitionist, who then goes out of his way to use the taboo words; and it provides an excuse for low forms of scatological and sexual humor.

Id. at 82-83.

As Farb points out, "[a]ny word is an innocent collection of sounds until a community surrounds it with connotations and then decrees that it cannot be used in certain speech situations * * *." *Id.* at 91. One of the reasons people in the American speech community "talk dirty"

> is to attract attention to the speaker because of the jolting effect of obscenity in places * * * considered inappropriate. Closely related to this reason is another: to display the speaker's contempt for the standards that his society upholds. Such a speaker often regards civil speech as the behavior of those who uphold the *status quo,* whereas talking dirty is a symbol of "honest" rebellion against the power structure. Further, militants of every

"loose, figurative, hyperbolic language" that cannot be taken as fact. The district court based its decision on just such reasoning.

4. *False Statements of Fact*

Because this "award" is rhetorical hyperbole there should be no need to proceed further in reviewing this

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> persuasion have shown that talking dirty is an effective rhetorical device for verbal aggression, an easy way to provoke confrontations. Finally, talking dirty is a way to sexually mock authority figures — parents, teachers, clergymen, policemen, political leaders — thereby relieving the speaker of his own feelings of inadequacy.
>
> The extremely obscene remark or joke, which is often signaled by an unusually gross and obscene vocabulary, often hides by means of laughter the speaker's anxiety about certain taboo themes in his personality or his culture.

Id. at 85-86.

Finally, Farb comments, "Prohibiting certain words actually elevates them in a neurotic way by encouraging the strategy of talking dirty; it endows them with titillation, shame, and a vulgarity that the things they stand for do not themselves possess." *Id.* at 94. Farb reminds us that in 1934, Allen Walker Read of the University of Chicago suggested we get rid of taboo words "in a very simple way — by using the words." *Id.* Perhaps Read was prophetic. Consider Justice Powell's observation that:

> It may well be, in view of contemporary standards as to the use of vulgar and even profane language, that this particular petitioner had no reason to believe that this expletive ["chicken shit"] would be offensive or in any way disruptive of proper courtroom decorum. Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances.

Eaton v. City of Tulsa, 415 U.S. 697, 700, 94 S.Ct. 1228, 1231, 39 L.Ed.2d 693, 696-97 (1974) (Powell, J., concurring opinion). And, further, consider *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29

appeal. However, the majority has wandered afield, and I hasten to call after them, entreating them to return to the proper path. Assuming there is more to *Hustler's* attack than vigorous epithet, I would as readily dispose of the "alleged false statements of fact." Under that category, the statements concerning a "publicity-grab" and a "nuisance suit" are not even directed at Spence. They are plainly referring only to Dworkin. The statements call the lawsuit Dworkin's "publicity-grab" and a "nuisance suit initiated by Dworkin." Even if these statements were directed at Spence, they are not actionable. *See e.g., Camer v. Seattle Post-Intelligencer,* 45 Wash.App. 29, 723 P.2d 1195 (1986).

Also not actionable are the remaining statements that lawyers, including Spence, are eager to sell out for money, that it appears Spence is more interested in promoting his bank account, and that Spence's log-cabin image is phony. The belief that lawyers are eager to sell out for money is not new with *Hustler.* As I said earlier, such opinion has

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L.Ed.2d 284 (1971) ("Fuck the Draft" emblem on jacket worn into federal courtroom) and *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (because of its content of patently offensive "seven dirty words," the government may regulate a radio broadcast, but in a different context, such as a writing, the government probably may not regulate those words.) In *Pacifica,* the majority held that the F.C.C. can regulate "the pig that has entered the parlor," referring to radio waves unsuspectingly intruding the privacy of the home where tender ears of children might hear. *Id.* 438 U.S. at 750-51, 98 S.Ct. at 3041, 57 L.Ed.2d at 1094. In contrast, with reference to Hustler's article about Spence, and with due apologies to pig farmers and pig lovers everywhere, one is tempted to observe that the "pig never left the sty" since the vulgar words appeared within the four corners of the "farmer's" own magazine. It is hard to believe that *Hustler* magazine could unsuspectingly intrude upon the privacy of the parlor unless the parlor owner intended it to be there.

been held and expressed in a variety of ways by countless persons throughout the world for at least 2,000 years.

In connection with this "sell-out" label, the statement about Spence promoting his bank account is obviously based on the facts that he charges a fifty percent fee, has made millions, owns a large ranch, and has won big judgments in celebrated cases brought on behalf of the "little guy" in the name of "family values." The *Hustler* attack questions Spence's motive in representing a perceived "anti-family values" client like Dworkin in an effort to chill the first amendment's freedom of speech, which is obviously a "traditional value." Based on disclosed facts, *Hustler* formed and expressed an opinion that Spence took the case to make big money, fifty percent of the $150 million for which Dworkin sued. The same analysis disposes of the statement that his log-cabin image is phony. It is obviously based on the disclosed facts that Spence is worth millions, owns a large ranch, and has won large judgments.

Stripped of the vulgarity-laden rhetorical hyperbole, *Hustler's* article expresses the simple theme that *Hustler*, a chafing defendant in a lawsuit involving the ongoing conflict between freedom of speech and pornography, does not hold a high opinion of the famous, financially successful, highly skillful opposing lawyer who usually espouses the cases of the "little guy" and "family values" against the evil forces that would take from "the little guy" the freedom of speech. In *Hustler's* opinion Spence has lost his way by representing a plaintiff who is the antithesis of "family values" and "constitutional values." I have no trouble in finding that *Hustler's* article is nonactionable opinion about a public figure on a subject of public concern.

PUBLIC FIGURE STATUS

Here again this appeal should be resolved without discussion of the question of public figure/private person status. As the majority opens this furrow and intimates the result it believes appropriate, I am obliged to attempt to straighten its course. Spence admitted he is a public figure in response to a request for admissions during discovery. In addition, in his answers to interrogatories he stated he had written and published several books, including *Gunning for Justice* (1982). This book, according to the jacket description and a reading of its contents, is "the autobiography of a man who struggled through a painful and desolate metamorphosis to become the leading spokesman for a new system of law and lawyers for the people." The book chronicles how Spence "has fought — and won — some of the most important criminal and civil cases of our time." In the book Spence tells his reader about his *Silkwood, Cantrell, Hopkinson, and Bonnie* cases on which the spotlights of public concern and the media shone in the 1970's and 1980's. He reminds the reader that he was prosecuting attorney for Fremont County from 1953-1962 and an unsuccessful candidate for United States Congress. Styling himself as a "country lawyer" he candidly tells his readers about his fifty percent fee, his speechmaking across the country and television appearances. His public figure stature is further documented by the list of his television appearances since January, 1984, that he produced during discovery.[3]

The district court found Spence to be a public figure based on his admitted and conceded status. There is no wonder why. Wyoming libel jurisprudence relating to public figure status is settled. *See MacGuire* and *Adams.*

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[3]The list of television appearances is included as an appendix.

It mirrors federal libel jurisprudence. *Gertz; Curtis Publishing; New York Times.* If Bob Adams of *Adams* was a public figure, and this court held that he was, then so is Spence. After reviewing Adams' accomplishments, which pale in comparison to Spence's, this court allowed that, "[q]uite likely he is a public figure for all purposes and in all contexts." *Adams,* 555 P.2d at 559-62. If William M. Kunstler was held to be a public figure generally, and he was, then so is Spence. In *Ratner v. Young,* 465 F.Supp. 386 (D.V.I.1979), in determining Kunstler's status, the court noted that "Kunstler was one of the leading lawyers in the country devoting his time to the defense of members of minority groups charged with crime." The court observed that "[h]e styled himself 'an itinerant lawyer' " *Id.* at 399. The court added that Kunstler's lawyer in the motions hearing admitted that his client was a controversial figure on a national scale. *Id.* at 400. Is it overstating it to say that Spence's celebrity compares favorably with Kunstler's? I think not.

I add one final piece of evidence to make the case for Spence's public figure status. At the beginning of the oral argument of this appeal, Spence's lawyer informed this court that Spence is a public figure. He did so in the presence of all assembled, including Spence, a standing-room-only crowd and news reporters and television cameras.[4]

Based on the record and the law, Spence has assumed a role of "special prominence in the affairs of society." He occupies a position of "such persuasive power and influ-

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[4]It is noteworthy in considering Spence's status as a public figure that the media, with cameras and microphones unfurled, showed up in the courtroom along with a large crowd. That in itself further emphasizes the public figure status of Gerry Spence. The presence of a large crowd and the media at oral arguments is very unusual.

ence" that he is deemed a public figure for all purposes. *Gertz,* 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808. In this regard it is curious that the majority studiously avoids dealing with this status of public figure for all purposes, instead limiting its discussion to the status of limited purpose public figures.

The majority justifies its refusal to acknowledge Spence's status as a public figure by expressing concern over the need to protect advocates who are attacked merely because they represent clients embroiled in public controversies. I do not disagree with this concern, but note that such protection is the precise subject of *Gertz.* There, the Supreme Court held that Gertz, an attorney, was a private figure because "his participation related solely to his representation of a private client * * *. [H]e never discussed the * * * litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence the outcome." *Gertz,* 418 U.S. at 352, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. This standard protects most advocates, who are not public figures in their own right or have otherwise not injected themselves into the public controversy, but does not apply to Gerry Spence. It does not apply because Spence is, in the light of the evidence and his own admission, a public figure for all purposes.

If the *Hustler* feature were not considered rhetorical hyperbole, Spence, as a public figure, would have to prove that *Hustler* made false statements about him with actual malice. "Actual malice" does *not* mean "ill will"; its legal meaning in a libel context is "with knowledge that it is false or with reckless disregard for whether it was false or not." *Sullivan,* 376 U.S. at 279-80, 84 S.Ct. at 726, 11 L.Ed.2d at 706; and *Adams,* 555 P.2d at 558. Arm

waving, histrionics and speculation are not evidence. The record does not contain a showing of actual malice sufficient to defeat the motion for summary judgment.

CONCLUSION

I am disappointed that this court, which professes a tradition of expanding rights beyond the requirements of federal constitutional requirements. *See Washakie Country School District No. One v. Herschler,* 606 P.2d 310 (Wyo.), *cert. den. Hot Springs County School Dist. No. One v. Washakie Country School Dist. No. One,* 449 U.S. 824, 101 S.Ct. 86, 66 L.Ed.2d 28 (1980); *Black v. State,* (No. 90-128, circulated Dec. 14, 1990), would now attempt to constrict so fundamental a right as free speech to a level obviously below the federal constitutional floor established by Supreme Court first amendment decisions. The law is clear with respect to *Hustler's* article being nonactionable because its hyperbolic epithets cannot reasonably be considered as stating actual facts, as well as with respect to Gerry Spence's being a public figure for all purposes who has not made a showing of actual malice; the law was correctly applied by the district court.

"[N]ever send to know for whom the bell tolls; it tolls for thee,"[5] not just for *Hustler.* It tolls for all who are found within the borders of this state. It tolls for every person who speaks or writes — whether in a letter to the editor of the local newspaper or a conversation over the backyard fence. It tolls for any person, young or old, professional or unskilled, educated or illiterate, who rails in polysyllabic words or, heaven forbid, the rougher four-

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[5]J. Doone, "Devotion" in *The Great Thoughts* (G. Seldes comp.1985).

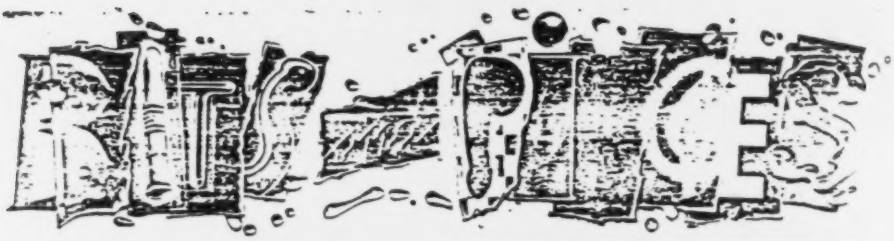
letter variety against those who would call the tune to which the rest of us must dance.

The right to freedom of speech has frost on it today. I am compelled to dissent lest tomorrow it be entombed in ice.

APPENDIX A

Hustler Magazine Article "Bits and Pieces"

(alleged defamatory article)



ASSHOLE OF THE MONTH

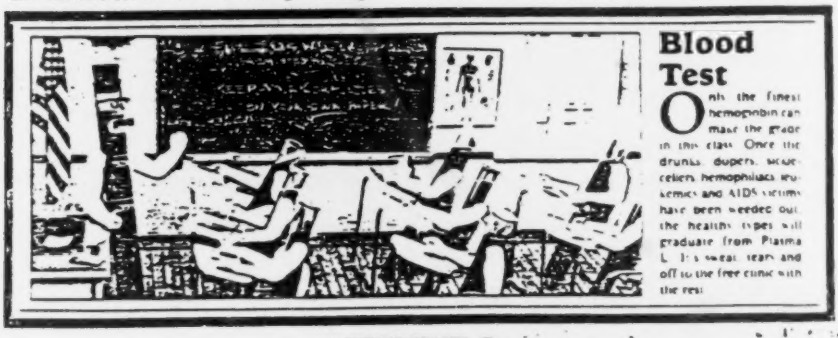
Gerry Spence

Many of the vermin-infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. These shameless assholes whose main allegiance is to money are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July.

Spence dudes himself up in western duds and calls himself a "country lawyer," but the log-cabin image is as phony as a cum-dripping whore's claim of virginity. This reeking rectum is worth millions and owns a 35,000-acre ranch. Spence's claim to fame is that in the name of "the little guy" he's won some mighty big judgments against some mighty big corporations: $10.5 million against Kerr-McGee (the famous Karen Silkwood case), $26.6 million against *Penthouse* and $52 million against McDonald's. He'd like to add HUSTLER to the list ... for a whopping $150 million. His client is "little guy" militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.

Dworkin seems to be an odd bedfellow for "just folks," "family values" Spence. After all, Dworkin is one of the most foul-mouthed, abrasive man-haters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance *co-authored* by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of courtin' for this lawyer. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry "This Tongue for Hire" Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes.

This case is a nuisance suit initiated by Dworkin, a crybaby who can dish out [illegible] but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all. Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses.



Blood Test

Only the finest hemoglobin can make the grade in this class. Once the drunks, dopers, wife-beaters, hemophiliacs, leukemics and AIDS victims have been weeded out, the healthy types will graduate from Plasma U. It's sweat, tears and off to the free clinic with the rest.

APPENDIX B

List of Television Appearances

TELEVISION APPEARANCES—GERRY SPENCE

Regularly Scheduled National Shows
(Network and city of origin)

60 Minutes—CBS
One on One—ABC—New York
Merv Griffin—Syndicated—Los Angeles

BEST AV

APPENDIX B — Continued

With Richard Hogue — Syndicated — Los Angeles
Today Show — NBC — New York
Crossfire — CNN — Washington, D.C.
David Letterman — NBC — New York
CBS Morning News — CBS — New York
Good Morning America — ABC — New York
Larry King, Live — CNN — Washington, D.C.
Take Two — CNN — New York
Media Report — CNN — New York
Kup Show — PBS — Syndicated — Chicago
Cromie's Circle — WGN — Chicago
PBS Late Night — PBS — Detroit
Nightline — ABC
CBS Evening News with Dan Rather — CBS
CNN News — CNN
PM Magazine — Syndicated

Note: This list does not include unscheduled on-the-spot interviews usually conducted in a courthouse.

Specials or Series — National

"The Trial of Lee Harvey Oswald" — Showtime

Viewpoint — ABC — Boston

Constitution: That Delicate Balance — Media and the Law Libel — Princeton, NJ, and Philadelphia Insanity Defense — Philadelphia Prison Reform or Victims' Rights — Columbus

CBS carried the Princeton show, PBS the rest.

Miller's Court — PBS — Boston
Portrait of America — WTBS

ILABLE COPY

APPENDIX B — Continued
LOCAL TELEVISION SHOWS —
Station and City of Origin

People Are Talking — WJZ — Baltimore
Good Day — WCVB — Boston
Weekend with Dave Finnegan — WNEV — Boston
Daytime — WSBK — Boston
Weekday — WNAC — Boston
Morning Exchange — WEWS — Cleveland
Live on Five — WEWS — Cleveland
Dave Baum Today — WMAQ — Chicago
AM Chicago — WLS — Chicago
Midday News — WMAQ — Chicago
Chicago Today — WCIU-TV — Chicago
Live at 5 — KDFW — Dallas
Newsmakers — KMGH — Denver
Midday — KWGN — Denver
Alan Berg Show — KOA — Denver
Town Hall Tonight — KWGN — Denver
9 News at 6 AM — KUSA — Denver
4:30 News — KUSA — Denver
Kelly & Company — WXYZ — Detroit
Good Morning Oregon — KEZI — Eugene
Eleven News Magazine — KTVT — Fort Worth
Good Morning Houston — KTRK — Houston
Houston Live with Roger Gray — KRIV — Houston
Wake Up, Houston — KHTV — Houston
Noon News — KIDK — Idaho Falls, Idaho
Mid-Morning Los Angeles — KHJ — Los Angeles
LA at 4 — KNBC — Los Angeles
MMLA — KHJ — Los Angeles
Midday News — KTTV — Los Angeles
A.M. Los Angeles — KABC — Los Angeles
Twin Cities Live — KSTP — Minneapolis
Straight Talk — WOR — Newark

APPENDIX B — Continued
LOCAL TELEVISION SHOWS —
Station and City of Origin

Live at 5 — WNBC — New York City
Newsmakers — KWTV — Oklahoma City
Newswatch Omaha — KTO — Omaha
People Are Talking — KYW — Philadelphia
Weekend Magazine — KDKA — Pittsburgh
Noon News — WTAE — Pittsburgh
Newsroom 6 at Noon — KOIN — Portland
AM Northwest — KATU — Portland
Live at Noon — KATU — Portland
Take 2 — KUTV — Salt Lake City
Dimension 5 — KSL — Salt Lake City
Dave Baum Today — WMAQ — Chicago
Twin Cities Live — KSTP — Minneapolis
9 News at 6 AM — KUSA — Denver
4:30 News — KUSA — Denver
MMLA — KHJ — Los Angeles
Midday News — KTTV — Los Angeles
A.M. Los Angeles — KABC — Los Angeles
People Are Talking — KPIX — San Francisco
Noon News — KPIX — San Francisco
Good Company — KING — Seattle
Noon News — KIRO — Seattle
Front Row Video — KGO — San Francisco
Live on 4 — KRON — San Francisco
Northwest — KOMO — Seattle
Seattle Today — KING — Seattle
Charlie Rose Interview — WRC — Washington, D.C.
Panorama — WTTG — Washington, D.C.

APPENDIX B

1ST CASE of Level 1 printed in FULL format. GERRY L. SPENCE AND THE SPENCE FOUNDATION FOR PEOPLE'S ATTORNEYS, INC., Appellants (Plaintiffs) Cross-Appellees, v. LARRY FLYNT; ALTHEA FLYNT; L.F.P., INC., a California corporation; LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE, INC., a California corporation; FLYNT DISTRIBUTING COMPANY, a California corporation; FLYNT SUBSCRIPTION COMPANY, a Nevada corporation; LFZ, LTD., a B.W.I. corporation; ISLAND DISTRIBUTING, INC., a B.W.I. corporation; DAVID KAHN; JIM GOODE, DOUG OLIVER; N. MORGEN HAGEN; LONN M. FRIEND; INLAND EMPIRE PERIODICALS, an Oregon corporation; and PARK PLACE MARKET, INC., a Wyoming corporation, Appellees (Defendants) Cross-Appellants

No. 89-17

Supreme Court of Wyoming

1991 Wyo. LEXIS 147

September 16, 1991
September 16, 1991, Filed

PRIOR HISTORY: [*1]

Original Opinion of August 8, 1991, Reported at 1991 Wyo. LEXIS 125.

JUDGES: Walter Urbigkit, Chief Justice. Golden, J., would have granted the petition.

OPINION BY: URBIGKIT

OPINION: ORDER DENYING PETITION FOR REHEARING

Appellees having filed a Petition for Rehearing, and the Court, having examined the files and record of the Court

and being fully advised in the premises, and having considered carefully Petitioners' Brief in Support of Petition for Rehearing and Supplement to Petition for Rehearing, finds that there is no basis for granting a rehearing in this case and that the Petition for Rehearing should be denied, and it therefore is.

ORDERED that the Petition for Rehearing filed herein be, and the same hereby is, denied.

APPENDIX C

[SEAL]

The State of Wyoming
Eighth Judicial District

J. T. LANGDON
DISTRICT JUDGE
THOMAS D. BROWNING
COURT REPORTER

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RE: Dworkin v. LFP, Inc., et al.
Teton Co. Civil No. 6328

Gerry Spence, et al. v. Larry Flynt, et al.
Teton Co. Civil No. 6568

Gentlemen:

There are two issues which must be decided by the Supreme Court, before I undertake to engage in a long, expensive and perhaps worthless trial on factual issues that shouldn't have been tried. The first, of course, is whether as matters of law, or based upon the pleadings alone, are the parties plaintiff or the parties defendant entitled to a judgment on the issue of liability. The second issue, which is no less important, is whether Gerry

Spence, plaintiff in one case and counsel for plaintiff in the other, should be disqualified. The rulings are the same in each case, though the factual situations are somewhat different, militating separate discussions.

I find that the defendants, in each case, are entitled to judgment, as a matter of law, and that plaintiffs' motions for judgment are denied. I also find that defendants' motions to disqualify Mr. Spence, or any member of his firm from acting as counsel in each of these cases, should be and, are denied.

Case No. 6328 — DWORKIN

Plaintiff Andrea Dworkin is a public figure, actively engaged in proselytizing those who would listen and on behalf of the National Organization of Women. She filed this action (her second) against defendants because she was chilled by the second article in "Hustler" magazine, which singled out Mr. Spence and, in the process, rendered a few more choice (of their choosing, not mine) words about plaintiff. Among these are "a shit-squeezing sphincter", "a militant Lesbian feminist", and that she advocated bestiality, incest and sex with children. Whether such be termed by plaintiff as libelous or outrageous conduct (intentional infliction of emotional distress), I believe that the inferior courts and the people have had this matter settled for them, most recently in *Hustler Magazine, Inc. v. Falwell,* 108 S.Ct. 876 ____ U.S. ____ (1988). Plaintiff claims that this case does not apply because plaintiff intends to prove actual malice, be it a case of libel or a case of outrage.

"Libel", simply put, is a defamation by publication that is injurious to the reputation of another, which publication is false and not privileged, *Black's Law Dictionary,* 5th Edition 1983; *Tschergi v. Lander State Journal,* 706

P.2d 1116 (Wyo. 1985). "Outrage" is of a more recent vintage, but simply put, it is outrageous conduct which goes beyond all possible bounds of decency, accompanied by distress, so severe that it is beyond the endurance of a reasonable person, *The Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1059).

It appears, from the pleadings, that plaintiff is a leader of an anti-pornophy campaign, which urges that the law ought to define "pornography" as sexually explicit images that degrade or subordinate women, further than any person can sue to ban such materials and also collect damages for the harm done. "Hustler" is opposed to such law. The confrontation inexorably led to the cases at bar. Plaintiff had previously sued the defendants on essentially the same bases, the difference being that in the first litigation she singularly depicted in a cartoon series, as opposed to the present case, wherein Mr. Spence was so singled out, with plaintiff being tangentially mentioned in the accompanying commentary. The other defendants are either owners, officers or employees of the magazine, or connected with the distribution or sale of same. If the actions are to fail against "Hustler", it fails as to all other defendants.

I find that, as an undisputed fact in her article, "Woman Hating", attached to the motions, plaintiff can reasonably be interpreted as being an advocate of bestiality, incest and sex with children. The remainder of the article was rhetorical hyperbole or just pure fantasy, as determined by the courts of our country. Case after case after case, with the support of the 1st and 14th Amendments of the Constitution of the United States, on the questions of free speech and equal protection, have so held. Many of the cases — in fact, all of the cases involving one or more

of the plaintiffs herein — contain gutter[1] language, similar to that used when referring to plaintiff. Plaintiff urges that actual malice may be inferred from the nature of the publication, *MacGuire v. Harriscope Broadcasting Co.*, 612 P.2d 830, 839 (Wyo. 1980), in discussing such a position, stated:

> ". . . . proof of 'actual malice' calls into question the defendant's state of mind and that question does not readily lend itself to summary disposition. The use of the motion judgment, however, is not foreclosed and plaintiff, to avoid the summary judgment, still must demonstrate for the District Court evidence upon which could be premised a finding under the standard of convincing clarity that the publisher knew the information was false or published with a subjective awareness of probable falsity."

In view of the aforementioned cases, the issue of true/false may be considered as buried under the defense of pure fantasy and preposterousness, whether the material be called by the plaintiff "libel" or "outrage".

Now to the issue of edited opinion: As stated in *Camer v. Seattle Post-Intelligencer,* 723 P.2d 1195 (Wash. App. 1986):

> "While communication of a false fact may not be privileged, expressions of opinion are protected under the 1st Amendment and thus are not actionable:
>
> > Under the 1st Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the

---

[1]". . . . marked by extreme vulgarity, cheapness or indecency", *Webster's Ninth New Collegiate Dictionary,* 1985.

> conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. (citations omitted). A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
>
> The determination of whether a communication is one of fact or opinion is a question of law for the court. (citation omitted). In making this determination, the court should consider:
>
> > (1) the entire article and not merely a particular phrase or sentence; (2) the degree to which the truth or falsity of a statement can be objectively determined without resort to speculation; and (3) whether ordinary persons hearing or reading the matter perceive the statement as an expression of opinion rather than a statement of fact."

This is yet another test of truth falsity or opinion, which dictates that the article and photo are communications of opinion. I have a great deal of difficulty agreeing that (1) ordinary people would read this matter in the first place or (2) having read it, could perceive it as being anything but an opinion. That such an opinion is intemperate, vulgar, uncouth and even mischievous do not render it actionable. Little would be gained here in comparing the statements herein with the lexicon contained in the other Dworkin case, the Leidholdt case or the Ault case, which have been made part of the file herein. Once again, I believe that *Falwell* supra is controlling herein and this Court is bound thereby. The primary issue here — not the whole issue — is freedom of speech. After review of the motions and counter motions, the

affidavits furnished by defendant and the deposition of Mr. Hermowitz of 5 November, 1986, I have been unable to find a false statement of fact which was made with actual malice.

Case No. 6568 — SPENCE

Mr. Spence is seeking damages for emotional distress and invasion of privacy brought about by his selection of "Asshole of the Month" in the July, 1985 issue of "Hustler". Mr. Spence has specifically stated for the record, through counsel, that he is not claiming any loss of income nor damage to reputation. Furthermore, Mr. Spence's claim for invasion of privacy is not a claim for any physical act, but rather for the emotional distress. I have already referred to the gutter language contained in the publication as to plaintiff Dworkin; I find this language is likewise categorized. Be that as it may, however, I believe that such a description, when viewed or read by ordinary persons, cannot perceive it as anything but an opinion, *Camer v. Seattle Post Intelligencer* supra. The fact that it may be "outrageous", as used in the context of "emotional distress", is immaterial, *Hustler Magazine, Inc. v. Falwell* supra. In *Falwell,* the Supreme Court likens the instant attraction to a political cartoon as being:

> "a weapon of attack, of scorn and ridicule and satire .... It is usually as welcome as a bee sting and is always controversial in some quarters", 108 S.Ct. 876, 881.

The language contained in the article is epithetic not unlike that described in *Bucker v. Roberts,* 595 P.2d 239 (Colo. 1959). The *Bucker* case emanated from an oral altercation between the parties, both of whom worked for May D&F. Defendant Bucker was Robert's supervisor

and became incensed at Roberts dealing with several suppliers of clothing, used uncultivated and earthy language in remonstrating Roberts and caused Roberts to be separated from May D&F employment. The Supreme Court of Colorado stated that mere use of foul, abusive or vituperative language .... does not constitute defamation and the most repulsive language enjoys immunity, provided it falls short of a deliberate or reckless untruth. While the case is not exactly on point, because it deals with "fact" instead of "opinion", it does serve to point out the extent to which our courts safeguard 1st Amendment free speech and the burden of proof which is placed upon those who claim to be offended.

The Colorado Court further stated, citing *Restatement of Torts,* par. 566 (1976):

> "Verbal abuse. There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally or seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult.
>
> The abusive statement here could not have reasonably been understood to be taken literally or seriously and amounted to no more than rhetorical hyperbole uttered in an outburst of anger.
>
> In our view, the challenged statement neither contains nor implies false, defamatory facts. It disclosed

the underlying basis for the opinion, and therefore, as a matter of law, is not actionable.

Because of our disposition, we need not decide whether or not the plaintiff proved special damages."

SUMMARY JUDGMENT/JUDGMENT IN THE PLEADING

Both plaintiffs and defendants, have moved for Judgment on the Pleadings and defendants also filed Motions for Summary Judgment. I believe that the pleadings alone are sufficient to support a judgment for defendants on the issues of libel and intentional infliction of emotional distress. The factual allegations of plaintiffs, admitted as being true, do not, as a matter of law, support either cause of action. These plaintiffs are public figures. As such, they are exposed to such as is "Hustler". "Hustler's" general make-up is salacious and is directed to people of similar inclinations. In that context, the article involved is regular feature "regaling" those opposed to the views adopted by "Hustler". The pleadings themselves display this. I also believe that, absent such, defendant is entitled to Summary Judgment under the guidelines set forth in *Cordova v. Cosar,* 739 P.2d 625 (Wyo. 1986), *Stratman Adm. v. Admiral Beverage Corp.,* 760 P.2d 974, 979 (Wyo. 1988). There are no material issues of fact in these cases. There is no dispute as to the standings herein of the various defendants and that each is so placed because of the feature appearing in the July, 1985 edition of the magazine. If that feature is constitutionally or legally protected, so is each of the defendants. I find such to be the case.

I am aware also of the several "Hustler" cases which have proceeded this one, in the District, Circuit and Supreme Courts of the United States, the last being the

Falwell case. I believe that the laws of Wyoming, herein applied, lead to the same inevitable result. The 1st and 14th Amendments to the United States Constitution and Art. 1, Sec. 20 of the Wyoming Constitution and the case interpreting same, so provide.

DISQUALIFICATION

I find the law firm, of which Mr. Spence is a member, should not be disqualified in either of these cases. The representation of Mr. Shockey is that no one associated with the firm of Spence, Moriarity and Schuster is going to testify in these matters, except for M. Spence in his own case, and clearly shows that the firm will comply with Rule 3.7(a) Rules of Professional Conduct. Furthermore, it appears to me that such disqualification would work a substantial hardship on plaintiff Dworkin. It is apparent that these cases have been ongoing for a considerable length of time — that considerable time and effort has been devoted by counsel and client in furtherance of their quests. The extent of the hardship is further exacerbated by the fact that I have found that defendant is entitled to judgment and all matters herein and the net effect of his action, plus disqualification, would deny plaintiff Dworkin's right to an expeditious appeal to the Supreme Court. No one disputes that the relationship of attorney/client has never existed between or among plaintiffs and any member, past or present of said firm. This serves to satisfy the caveat of *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988).

Counsel for defendants will please draw up the requisite order, present same to counsel for plaintiffs for form approval and to the Court for execution and filing.

Very truly yours,

/s/
J.T. LANGDON
District Judge

JTL/bjm

APPENDIX D

ASSHOLE OF THE MONTH

Gerry Spence

Many of the vermin-infested turd dispensers we name Asshole of the Month are members of that group of parasitic scum-suckers often referred to as lawyers. These shameless assholes (whose main allegiance is to money) are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets. The latest of these hemorrhoidal types to make this page is Jackson, Wyoming, attorney Gerry Spence, our Asshole of the Month for July.

Spence dudes himself up in western duds and calls himself a "country lawyer," but the log-cabin image is as phony as a cum-dripping whore's claim of virginity. This reeking rectum is worth millions and owns a 35,000-acre ranch. Spence's claim to fame is that in the name of "the little guy" he's won some mighty big judgments against some mighty big corporations: $10.5 million against Kerr-McGee (the famous Karen Silkwood case), $26.6 million against *Penthouse* and $52 million against McDonald's. He'd like to add HUSTLER to the list . . . for a whopping $150 million. His client is "little guy" militant lesbian feminist Andrea Dworkin, a shit-squeezing sphincter in her own right. In her latest publicity-grab, Dworkin has decided to sue HUSTLER for invasion of privacy among other things.

Dworkin seems to be an odd bedfellow for "just folks," "family values" Spence. After all, Dworkin is one of the most foul-mouthed, abrasive man-haters on Earth. In fact, when Indianapolis contemplated an antiporn ordinance *co-authored* by Dworkin, she was asked by its supporters to stay away for fear her repulsive presence would kill the statute. Spence, however, can demand as much as 50% of the take from his cases. And a possible $75 million would buy a lot of courtesy for this lawyer. Considering that Dworkin advocates bestiality, incest and sex with children, it appears Gerry "This Tongue for Hire" Spence is more interested in promoting his bank account than the traditional values he'd like us to believe he cherishes.

This case is a nuisance suit initiated by Dworkin, a crybaby who can dish out [illegible] but clearly can't take it. The real issue is freedom of speech, something we believe even Dworkin is entitled to, but which she would deny to anyone who doesn't share her views. Any attack on First Amendment freedoms is harmful to all . . . Spence's foaming-at-the-mouth client especially. You'd think someone of Spence's stature would know better than to team up with a censor like Dworkin. Obviously, the putrid amber spray of diarrhea known as *greed* has clouded this Asshole's senses.

Blood Test

Only the finest hemoglobin can make the grade in this class. Once the drunks, dopers, sickle-cellers, hemophiliacs, leukemics and AIDS victims have been weeded out, the healthy types will graduate from Plasma U. It's sweat, tears and off to the free clinic with the rest.

EXHIBIT A

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(2)

No. 91-1213

In The

Supreme Court of the United States

October Term, 1991

LARRY FLYNT; ALTHEA FLYNT; L.F.P., INC.; LARRY FLYNT PUBLICATIONS; HUSTLER MAGAZINE INC.; FLYNT DISTRIBUTING CO.; FLYNT SUBSCRIPTION CO.; LFZ, LTD.; ISLAND DISTRIBUTING, INC.; DAVID KAHN; JIM GOODE; DOUG OLIVER; N. MORGEN HAGEN; LONN M. FRIEND; INLAND EMPIRE PERIODICALS and PARK PLACE MARKET, INC.,

Petitioners,

vs.

GERRY L. SPENCE and THE SPENCE FOUNDATION FOR PEOPLE'S ATTORNEYS, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Wyoming State Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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ISSUES PRESENTED

1. When Petitioners published statements in a national magazine stating that Gerry Spence, an attorney, was "eager to sell out [his] personal values, truth, justice and our hard-won freedoms for a chance to fatten [his] wallet", and that he filed a civil lawsuit for a private client out of "*greed*" and as both a "nuisance suite" and a "publicity-grab", does the First Amendment of the United States Constitution require dismissal of the resulting defamation action?

2. Does the First Amendment bar a jury from determining whether Petitioners' statements about Gerry Spence implied to a reasonable reader underlying false statements of fact?

3. When the Wyoming Supreme Court held, as a matter of state civil procedure, that Gerry Spence's status as a public figure should be reconsidered by the trial court, does any provision of federal law bar such reconsideration?

4. When the record is devoid of evidence concerning the relevant facts to determine whether Gerry Spence qualifies as a public figure in this litigation, should the trial court be allowed to reconsider this issue?

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STATEMENT OF FACTS

Defendant Larry Flynt is an infamous pornographer who publishes *Hustler* magazine. The Ninth Circuit Court of appeals has described much of the contents of *Hustler* as "disgusting and distasteful abuse." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 884 (9th Cir. 1988).

Three different monthly issues of *Hustler* published in 1984 contained relentlessly virulent attacks on Andrea Dworkin, a militant feminist opponent of pornography. Dworkin, an author of limited financial means, could not protect herself from *Hustler's* attacks except by filing suit. Through Gerry Spence and his law firm, Spence, Moriarity & Schuster, Dworkin sued Hustler, Flynt, and others for libel and related torts on February 21, 1985.

As soon thereafter as publication deadlines would allow, *Hustler* and Flynt retaliated with the article which forms the basis of this suit. *Hustler* named Spence "Asshole of the Month" for July, 1985. The article labelled Gerry Spence as belonging to a group of lawyers "(whose main allegiance is to money) [who] are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets." [App. at a-5 (parenthetical in original).] It stated that "Gerry 'This Tongue for Hire' Spence is more interested in promoting his bank account than traditional values." [App. at a-7 through a-8.] Contradictorily, it also charged that the suit that Spence filed on behalf of Andrea Dworkin was a "publicity-grab" [App. at a-7], and that it was a "nuisance suit" [App. at a-8], while also accusing Spence of taking Dworkin's suit out of "*greed.*" [App. at a-8 (emphasis in original).]

Gerry Spence filed the current suit in state court in Wyoming stating claims for defamation against Flynt and numerous other defendants.[1] The trial court dismissed the complaint. The Wyoming Supreme Court reversed. Defendants object to the state supreme court's ruling, arguing that their statements do not make any assertions of fact and that this case should therefore be dismissed. They also argue that the Wyoming court should not remand the issue of Gerry Spence's status as a public figure to the trial court, since Spence earlier in the litigation had conceded public fixture status.

Hustler and Flynt ground the arguments in their petition for certiorari on arguably questionable dicta in the opinion. But the result reached by the Wyoming Supreme Court is correct under federal law and should not be reviewed by this Court.

The effects of the ruling are limited by the procedural status of the case – a decision reversing a motion to dismiss, the state supreme court's ruling is not the final word determining liability in the case, but merely holds that the case should be allowed to progress towards trial. The Wyoming court's ruling directing the trial court to reconsider Gerry Spence's status as a public figure is particularly preliminary, since that ruling merely directs the trial court to give consideration to an issue which had not previously been raised in the case.

---

[1] The complaint also stated claims for intentional infliction of emotional distress, invasion of privacy and false light, and outrage.

Petitioners expend considerable effort attacking the reasoning of the Wyoming Supreme Court's decision. They are asking this Court to review *dicta* in a pretrial ruling in a state tort action. Review at this stage would deny Respondents and the courts the benefit of developing the record as the case goes through pretrial proceedings, trial, and appeal on the merits. Granting certiorari now would take from the Wyoming courts a chance to consider the issues presented in this case beyond the preliminary stage of a motion to dismiss. It is premature for this Court to hear this case at the present time.

ARGUMENT

I. Defendants have libeled Plaintiff Gerry Spence with statements which a reasonable reader could interpret as including false assertions of fact, and this is sufficient basis for a defamation action.

The ruling made by the Wyoming Supreme Court in this case – denying Defendants' motion to dismiss Plaintiff Gerry Spence's libel claims – is correct under *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 111 L.Ed. 2d 1, 110 S.Ct. 2695 (1990) and should not be reviewed by this Court. Under *Milkovich*, a defamation claim may be based on statements of opinion which a reasonable reader could interpret as making or implying an underlying statement of fact:

> If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either

> incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false statement of fact. Simply couching such statements in terms of opinion does not dispel these implications . . . *Id.*, 111 L.Ed. 2d at 17-18.

Petitioners' statements about Gerry Spence reasonably imply false statements of fact. The statements, in a national magazine, say that Plaintiff Gerry Spence was "eager to sell out [his] personal values, truth, justice and our hard-won freedoms for a chance to fatten [his] wallet . . . " This statement implies knowledge that Gerry Spence had made choices in his life indicating that he elevated a chance to earn money over personal values, a sense of justice, and civil rights. Similarly, Petitioners' statements that Spence was seeking publicity or acting out of greed in filing suit on behalf of Andrea Dworkin imply that they knew enough of the circumstances to determine that such motivations underlay Spence's decision to file that suit on behalf of that client.[2] Their statement that the suit failed by Spence on behalf of Andrea Dworkin was a "nuisance suit" also implies underlying facts, namely that the suit had no basis in law or fact and no chance of success. Such an accusation can also be understood to imply that the suit was motivated by a desire to force Defendants to incur the costs of defendant against frivolous litigation, or perhaps to settle merely to

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[2] Defendants cite cases holding that statements about someone's motivations cannot form the basis for a libel action. [Petition for Certiorari, at 18-19.] These cases, however, were decided prior to *Milkovich*, and rely on the theory that statements of opinion are completely protected under the First Amendment, which this Court rejected in *Milkovich*.

avoid such litigation costs. The reasonable reader could understand the "sting" of the article to accuse Spence of having evidenced values which ranked money and publicity over truth and justice.

Petitioners ask this Court to rule, as a matter of law, that no reasonable reader could infer false assertions of fact from Defendants' statements in the article. However, clearly the statements about Spence in the article at the least create a jury question as to how they would be understood by a reasonable reader. Under *Milkovich,* this is sufficient to defeat a motion on the pleadings. *See, Masson v. New Yorker Magazine, Inc.,* 501 U.S. ___, 115 L.Ed. 2d 447, 472, 111 S.Ct. 2419 (1991) ("We allowed the defamation action to go forward in (*Milkovich*), holding that a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters.") *See also, Hustler Magazine v. Falwell,* 485 U.S. 46, 57 (1988) (jury found that statement could not reasonably be understood as describing actual facts or events, and thus statements not actionable).

Beyond *Milkovich,* Petitioners marshall little authority to warrant this Court taking jurisdiction over this case. Petitioners' arguments rely on a plethora of improper authorities which fail to establish a conflict between lower courts on an issue of federal law.[3] Defendants

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[3] Petitioners argue that this Court should grant certiorari because the Wyoming Supreme court's decision in this case purportedly conflicts with decisions of the Court of Appeals of Washington, the Court of Appeals of Minnesota, the Appellate

(Continued on following page)

throughout their petition rely on cases interpreting state common law of libel, rather than federal constitutional law. *E.g. Lester v. Powers,* 596 A.2d 65 (Maine 1991)[4] (discussing fact/opinion distinction in Main common law of libel).

Petitioners' argument that their article merely contained unactionable insults, [Petition for Certiorari, at 17-18], relies exclusively on cases interpreting state defamation law, not federal constitutional principles. *Bartow v. Smith,* 149 Ohio St. 301, 78 N.E.2d 735 (Ohio 1948) (opprobrious epithets are ordinarily not actionable under common law); *Bucher v. Roberts,* 595 P.2d 239 (Colo. 1979) (same – citing only Colorado caselaw); *Wainman v. Bowler,* 176 Mont. 91, 576 P.2d 268 (1978) (discussing only Montana libel law); *Curtis Publishing Co. v. Birdsong,* 360 F.2d 344, 348 (5th Cir. 1966) (discussing liability for epithets, citing state precedents).

Petitioners next argue that the First Amendment bars libel suits based on statements about Spence's motives. [*Id.* at 18-21.] In this argument, Petitioners first cite to cases employing a test for "defamatory statements of fact versus constitutionally protected statements of opinion"

(Continued from previous page)

Court of Illinois, the United States District Court for the Central District of California, the United States District Court for the District of the Virgin Islands. [Petition for Certiorari, at 15-17.] Since none of these courts constitute a state court of last resort or a federal appellate court, conflict with which would form a basis for granting certiorari, this brief will not address these cases.

[4] Cited in the petition for certiorari as *Luster (sic) v. Powers,* 1991 Me. Lexis 195.

which was rejected by this Court in *Milkovich. E.g. Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986); *Woods v. Evansville Press Co.*, 791 F.2d 480 (7th Cir. 1986).[5] Petitioners then argue that the Wyoming court's decision here is inconsistent with the Restatement (Second) of Torts. The Restatement is not a source of federal law which would give this Court a basis for granting certiorari. [Petition for Certiorari, at 20-21.] Finally, Petitioners argue with *dicta* in the Wyoming Supreme Court's decision about the fair comment privilege. [*Id.*, at 22-23.]

None of this argument provides this Court with a proper basis for granting certiorari. When all these irrelevant authorities are disregarded, Petitioners' position fails for lack of authority.

II. The Wyoming Supreme Court decided, as a matter of state procedure, that the trial court should reconsider whether Plaintiff Gerry Spence is a public figure, and this Court should not interfere with this ruling at this time.

The Wyoming Supreme Court ruled that the trial court should *reconsider* whether Plaintiff Gerry Spence is a public figure for purposes of this litigation. There are

---

[5] Defendants' defamatory statements here bear a remarkable resemblance to the proxy statements which this Court found actionable under Section 14(a) of the Securities Exchange Act of 1934 last term in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. ___, 115 L.Ed. 2d 929, 111 S.Ct. ___ (1991). In that case the Court found that statements about the board of directors' *motivation* for urging shareholders to approve a merger could be proven false by objective evidence. *Id.* 115 L.Ed. 2d at 945-48.

several reasons, both procedural and substantive, why this Court should not hear an appeal on this issue, and certainly not at this time.

The Wyoming Supreme Court's remand instructs the trial court to make a determination based on a full development of the facts relevant to this issue. The record does not contain all the facts on this issue, because before the trial court all the parties assumed that Gerry Spence was a public figure. If the Wyoming courts decide, as a matter of Wyoming civil procedure, to allow a reconsideration of this issue at this stage, such a decision is a matter of state law and presents no federal issue for this Court to consider.

Further, although Gerry Spence is a nationally renowned trial lawyer, it is not at all clear that he should be considered a public figure *with regard to the issues presented in this case.* The leading precedent on the question of when a libel plaintiff qualifies as a public figure is *Gertz v. Welch*, 418 U.S. 323 (1974). Coincidentally, *Gertz* was a case brought by a lawyer handling a newsworthy and politically charged case on behalf of a client. That case recognized two types of public figures, namely those who are public figures for all purposes and "limited purpose" public figures:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an

> individual's participation in the particular controversy giving rise to the defamation.
>
> *Id.*, 418 U.S. at 352.

There is little evidence in the record of this case to show the extent of Gerry Spence's participation in the particular controversy giving rise to the defamation. Comparison with the facts of *Gertz* will make it clear that the record of this case is incomplete to make a determination on this issue.

In *Gertz*, the plaintiff was an attorney who the Court could find to have been active in community and professional affairs, serving as an officer of civic groups and professional organizations, and the author of several books and articles on legal subjects. *Id.*, 418 U.S. 351. Based on these findings, the Court concluded that this attorney, although well known in some circles, had achieved no general fame or notoriety in the community. *Id.*, 418 U.S. at 351-52. The Court also found that the attorney's participation in the controversy giving rise to the defamation "related solely to his representation of a private client." *Id.*, 418 U.S. at 352. He had not discussed that litigation with the press, and thus "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* Based on these facts, this Court found that the plaintiff in *Gertz* should not be considered a public figure for the purpose of that litigation. *Id.*

No such factual development of the record – about the amount of fame or notoriety that Gerry Spence has in the community, about whether he has participated in any controversy giving rise to the defamation beyond the

representation of a private client, about whether he has discussed any such issue with the press or engaged the public's attention prior to Defendants' defamatory statements – has occurred in the present case. The Wyoming Supreme Court found that the controversy here "involved Dworkin's fight against pornography." [App. at a-14.] That court was unable to find evidence in the record to support "Hustler's argument . . . that Spence has taken up the fight against pornography, thrust himself into the controversy as a public figure, and [that he] is therefore subject to response by persons taking the other side." [*Id.*] The Wyoming court quite properly found that Gerry Spence would only qualify as a public figure if he went beyond merely representing a client and "engaged in this controversy beyond the confines of the litigation . . . " [*Id.*] Such a holding is totally consistent with this Court's precedent in *Gertz, supra.*[6]

The Wyoming Supreme Court quite properly concluded that the courts should give careful consideration to the question of whether an attorney representing controversial clients in controversial cases is a limited purpose public figure. Such lawyers should not, by their involvement in such work, necessarily make themselves more vulnerable to libel by automatically gaining public figure status. Requiring lawyers to pay such a price for

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[6] Gerry Spence's response to an open-ended general request for admission to the effect that he was a public figure is not conclusive of the issues raised in the *Gertz* analysis. Of course, Gerry Spence was, and is, a public figure in the broad sense of the term. But his response did not constitute an admission that he injected himself into the pornography controversy.

such work could deter many lawyers from taking on such cases and – as the Wyoming Supreme Court found – harm clients who need representation by such a "skilled, capable, specialist" attorney. [App. at a-15.]

CONCLUSION

For all the above reasons, Respondents request this Court deny the Petition for Certiorari.

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